FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, *et al.*,

Petitioners,

v.

ROBERT FINNEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

PHILIP E. KAPLAN
1650 Tower Building
Little Rock, Arkansas 72201

JACK HOLT, JR.
1100 North University
Evergreen Place
Little Rock, Arkansas

PHILIP E. McMATH
McMath, Leatherman & Woods, P.A.
711 West Third Street
Little Rock, Arkansas 72201

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY BASS
ERIC SCHNAPPER
LYNN WALKER
10 Columbus Circle
New York, New York 10019

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, *et al.*,

Petitioners,

v.

ROBERT FINNEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

CITATIONS TO OPINIONS BELOW

The opinions of the courts below are as follows:

1. Memorandum Opinion of June 20, 1969; *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969) hereinafter referred to as *HOLT I.* (Appendix p. 22)*

*Appendix citations (hereinafter A.) are to the Appendix of Opinions, Decrees, Orders, and Pleadings prepared by the Respondents and filed with the Court.

2. Memorandum Opinion of February 18, 1970; *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (A. 34) affirmed and remanded 442 F.2d 304 (8th Cir. 1971) (A. 67) hereinafter referred to as *HOLT II*.

3. Memorandum Opinion of August 13, 1973; *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973) (A. 84), reversed *sub nom. Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974) (A. 112) hereinafter referred as *HOLT III*.

4. Memorandum Opinion of March 19, 1976, *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976) (A. 141); Clarifying Memorandum Opinion of April 2, 1976, unreported (A. 188); affirmed 548 F.2d 740 (8th Cir. 1977) (A. 195).

5. The Memorandum Opinion of September 29, 1977 in *Graves v. Lockhart*, E.D. Ark. Civil Nos. PB-74-C-81 and PB-74-C-107, is unreported (A. 198).

QUESTIONS PRESENTED

1. Did the District Court exceed its authority in forbidding the use of indefinite punitive segregation as part of its remedy for the unconstitutional conditions in the punitive facilities?

2. Does the Eleventh Amendment preclude the award of counsel fees from state funds where the unsuccessful state defendants in a federal action have acted in bad faith, vexatiously, wantonly, or for oppressive reason?

3. Does the Civil Rights Attorney's Fees Awards Act of 1976 authorize awards of counsel fees against state agencies in actions under 42 U.S.C. §1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes and constitutional provisions cited in the brief for petitioners, the case also involves Act 543 of the Arkansas Acts of 1977 approved March 18, 1977. Act 543 provides as follows:

ACT 543

"AN ACT Authorizing the State of Arkansas to Pay Actual Damages Adjudged Under Certain Circumstances Against Officers or Employees of Arkansas State Government, or Against the Estate of Such an Officer or Employee; Defining the Extent of Applicability of the Act: and for Other Purposes.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. The State of Arkansas shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by such a court as a result of a compromise settlement approved and recommended by the Attorney General, against officers or employees of the State of Arkansas, or against the estate of such an officer or employee, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.

SECTION 2. Upon the recommendation of the Attorney General, the State of Arkansas shall have authority to pay damages based on an act or omission by an officer or employee of the State of Arkansas while acting without malice and in good faith within the course and scope of his employment and in the performance of his official

duties, where the amount of damages is determined by negotiated settlement before or after an action had been commenced.

SECTION 3. Damages payable under this Act shall be reduced to the extent that the officer or employee has been indemnified or is entitled to indemnification under any contract or insurance.

SECTION 4. A party desiring to make a claim for indemnification under this Act shall notify the Attorney General of the filing of a complaint in any court or the making of any other form of demand for damages promptly after it is filed or made and permit the Attorney General to participate in all trial or settlement negotiations or proceedings regarding the complaint or demand. Compliance with all requirements of this Section shall be prerequisite to payment of any claim under this Act. Nothing in this Section shall be construed to deny any party desiring to make a claim under this Act from employing legal counsel of his choosing to defend any lawsuit or other demand for damages.

SECTION 5. The Arkansas State Claims Commission shall have jurisdiction over all claims for indemnification based on a judgment or negotiated settlement in conformity with Sections 1 and 2, and proceedings for the recovery of such claims, and the payment of such claims, shall be governed by the law governing proceedings before the State Claims Commission and payment of claims allowed by the Commission.

SECTION 6. Elected state officials and members of commissions, boards, or other governing bodies of agencies are officers of the State of Arkansas for the purpose of this Act.

SECTION 7. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 8. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 9. EMERGENCY. It is hereby found and determined by the General Assembly that a number of State officers and employees are being made defendants in lawsuits seeking damages for their acts or omissions in the performance of their official duties; that in many instances such lawsuits are filed against the estates of such officers or employees; and that it is essential that the State of Arkansas offer protection for its officers or employees against personal liability for performing their official duties, and that the immediate passage of this Act is necessary to accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approved."

APPROVED: March 18, 1977.

STATEMENT

A. Introduction

This is a consolidated group of cases in which prisoners confined in the Arkansas State Prison system have complained that conditions in the prisons violate their rights under the Fourteenth Amendment. The case has been pending since 1969 and the decisions of the

District Court – Circuit Court Judge J. Smith Henley (formerly district judge) sitting by special designation – have been reviewed by the Court of Appeals for the Eighth Circuit on three occasions.[1] The present petition seeks review of two rulings contained in the District Court's Third Supplemental Decree dated March 19, 1976 which were affirmed on appeal. The first ruling complained of was the District Court's decision limiting the amount of time prisoners may be confined in punitive isolation cells at Cummins and Tucker Prisons to a period of thirty days for a single offense. This 30-day limitation was one of a number of rulings ordering changes of rules and conditions in the punitive cells which were designed to comply with a prior mandate of the Eighth Circuit, which had in 1974 directed the District Court to formulate a remedy to "ensure that prisoners placed in punitive solitary confinement are not deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet." *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 207-208 (8th Cir. 1974).

The second ruling complained of by the petitioners is the District Court's award of a counsel fee of $20,000.00 to be shared by three court-appointed attorneys (Messrs. Kaplan, Holt and McMath) for services performed during the period from 1974 to 1976. The court ordered that this fee be paid from the budget of the Arkansas Corrections Department.

---

[1] The reported opinions occupy 129 pages in the official reports. The Eighth Circuit has called the case "seemingly endless." 548 F.2d at 741.

In order that the present issues may be seen in their complete context, we shall review proceedings from the inception of the case in 1969, before giving a more detailed statement of the proceeding which led to the Third Supplemental Decree. Throughout this statement of the case the facts regarding conditions and circumstances in the Arkansas prison system as found by the District Court are set out in some detail with references to appropriate parts of the record. It should be noted that the findings of fact by the District Court throughout this litigation have not been challenged in this Court by the petitioners and therefore are not at issue here. Thus, the legal questions presented by the decision sought to be reviewed must be judged in light of essentially undisputed facts.

B. *Holt I* and Previous Prison Suits

Litigation about prison conditions in Arkansas began in 1965 and has continued since that time, resulting in repeated holdings of constitutional violations. In *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965), and in *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), reversed in part 404 F.2d 571 (8th Cir. 1968), the courts outlawed the whipping of inmates with a strap and various tortures such as the "Tucker Telephone" and the "teeter board." The court found that Arkansas prisoners were being subjected to torture and "brutal

and sadistic atrocities."[2] In 1969 in *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir. 1969), the Court held in an individual case that solitary confinement did not violate a prisoner's constitutional rights.

In each of these earlier cases plaintiffs were inmates who filed *pro se* complaints and the cases were presented by court-appointed attorneys who served without compensation.[3]

[2] In *Jackson v. Bishop*, 268 F. Supp. 804, 815 (E.D. Ark. 1967), the Court wrote:

> "There can be no doubt that the brutal and sadistic atrocities which were uncovered by the investigation of the State police in August and September of 1966 cannot be tolerated. The Court has reference to the use of a telephone shocking apparatus, the teeter board, strapping on the bare buttocks and other torturous acts of this nature."

Some criminal prosecutions of prison employees were brought but few convictions were obtained. 309 F. Supp. at 368-369, note 4.

[3] The appointment of counsel was noted in each of the opinions. In *Talley v. Stephens*, 247 F. Supp. 683, 685 (E.D. Ark. 1965), the Court stated:

> "Petitioners have been represented most capably by Bruce T. Bullion of Little Rock and Louis L. Ramsay, Jr. of Pine Bluff, appointed by the Court to represent petitioners without charge. The Court is grateful to Messrs. Bullion and Ramsay for their services."

In *Jackson v. Bishop*, 268 F. Supp. 804, 806 (E.D. Ark. 1967) the Court said:

> "The court appointed Edward L. Wright of Little Rock and William S. Arnold of Crossett, both highly respected and experienced members of the Arkansas bar, to represent the plaintiffs without charge. They have done so most capably and the Court thanks them for their services."

(continued)

The *Holt I* proceedings which are described in the Memorandum Opinion of June 20, 1969, *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), resulted from the consolidation of three *pro se* prisoner complaints. The prisoners complained that confinement in isolation cells at Cummins Farm amounted to cruel and unusual punishment, that they were denied adequate medical care, and that the authorities fail to protect inmates from assaults by other inmates. 300 F. Supp. at 826. The court-appointed counsel for plaintiffs conducted an evidentiary hearing.[4] The Court rejected plaintiff's

(footnote continued from preceding page)

On Appeal in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the Court noted at p. 573:

> "We initially commend Edward L. Wright of Little Rock and William S. Arnold of Crossett, court-appointed counsel for the plaintiffs and Don Langston who argued the cases for the defendant for their candid, unemotional and fair and able presentations. The services rendered by Mr. Wright and Mr. Arnold, and the expenses they have incurred, were without anticipation of reimbursement."

In *Courtney v. Bishop*, 409 F.2d 1185, 1186 (8th Cir. 1969), the Court stated:

> "Phillip K. Lion and Robert L. Robinson, Jr. lawyers of Little Rock, Arkansas, were appointed to represent petitioner."

[4] The Court stated at 300 F. Supp. 827:

> "The court-appointed Mr. Steele Hays of Little Rock, an experienced and capable trial attorney, to represent petitioners without charge. Mr. Hays accepted the appointment. He and one of his associates, Mr. Jerry Jackson, without expectation of compensation or reimbursement, proceeded to the farm where they interviewed petitioners and others and took photographs of the facilities. Both Mr. Hays and Mr. Jackson vigorously represented petitioners at a rather extended hearing which consumed two full trial days and part of one night. The Court is most grateful to Messrs. Hays and Jackson for their services."

complaint about the food served to prisoners while in isolation. The Court also found that the evidence about assaults on prisoners by prison employees and trusty guards was not sufficient to justify relief. However, the Court did find that the State "has failed and is failing to discharge its constitutional duty with respect to the safety of certain convicts,[5] and that the conditions existing in the isolation cells, including overcrowding, render confinement in those cells under those conditions unconstitutional." 300 F. Supp. at 828. At the time of the 1969 decision, the isolation unit at Cummins was a one story concrete block building with twelve cells which were 10 feet long and approximately 8 feet wide. The Court found that the isolation cells were dirty and unsanitary, pervaded by bad odors, that the mattresses were uncovered and dirty and that the cells were chronically overcrowded. The average number of men confined in a single cell was four. 300 F. Supp. at 832.

Inmates in the isolation unit were served a food mixture known as "grue", which consists of meat, potatoes, vegetables, eggs, oleo, syrup and seasoning baked all together in a pan and served in four-inch squares. The Court found that grue was not appetizing and not served attractively but nevertheless found it a "wholesome and sufficient diet for men in close

[5] The Court particularly noted the problem of "Crawlers" and "Creepers", inmates who have had feuds with other inmates and who assaulted them while they were asleep. The Court noted that inmate "floorwalkers" were ineffective in preventing such assaults since they were either afraid to call guards or were in league with the assailants. 300 F. Supp. at 830-831.

confinement day after day." 300 F. Supp. at 832. In concluding that the confinement in isolation as then practiced at Cummins violated the Cruel and Unusual Punishment Clause, the Court noted that "if confinement of that type is to serve any useful purpose, it must be rigorous, uncomfortable and unpleasant." *Id.* at 833. However, the Court found that the "prolonged confinement of numbers of men in the same cell" under these conditions to be "emotionally traumatic as well as physically uncomfortable." *Id.* at 833. The Court said about the confinement in isolation: "It is hazardous to health. It is degrading and debasing; it offends modern sensibilities, and, in the Court's estimation, amounts to cruel and unusual punishment." *Id.* at 833.

The relief granted however was quite limited. The Court, rather than mandating specific changes, merely made "suggestions" to the defendants. 300 F. Supp. at 833-834. The Court suggested that efforts be made to hold the number of persons confined in a single isolation cell at one time to a "minimum". *Id.* at 834. The Court suggested that inmates not be long confined in isolation in advance of a hearing, and stated that the defendant "ought to be able at minimum expense to do something about the sanitary conditions of the cells and he might give consideration to doing so without much regard to the attitudes of the inmates." *Ibid.* The Court directed the defendants to report the changes made and retained jurisdiction.

C. *Holt II* – Litigation During 1970 and 1971

The *Holt II* proceedings are described in the Memorandum Opinion of February 18, 1970; *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), affirmed and remanded 442 F.2d 304 (8th Cir. 1971). In December 1969 Judge Henley consolidated five additional *pro se* prisoner complaints with the three cases which were considered in the *Holt I* opinion. He also appointed new counsel, Messrs. Kaplan and Holt, who have served since December 1969 as counsel for members of a class of prisoners in the Arkansas system.[6] The appointed counsel filed a Consolidated Amended and Substituted Complaint which prayed for declaratory and injunctive relief. A. 208. The Complaint alleged that the defendants violated the prisoners' rights under the Thirteenth and Fourteenth Amendments.[7]

[6]The Court stated at 309 F. Supp. at 364:

> "It appearing to the Court that constitutional questions raised by the petitions submitted by the complaining inmates per sese were substantial, the Court appointed Messrs. Jack Holt, Jr. and Philip Kaplan of the Little Rock Bar to represent Petitioners without charge. Messrs. Holt and Kaplan accepted the appointments and have done yeomen service on behalf of their clients. The Court wishes to thank them for their efforts."

[7]The claim is summarized in ¶20 of the Consolidated Amended and Substituted Complaint:

> "The actions of defendants have deprived members of the plaintiff class of rights, privileges and immunities secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, including: (a) the right not to be imprisoned without meaningful rehabilitative opportunities, (b) the right to be free from cruel and unusual punishment, (c) the

(continued)

The Court sustained the claim that the overall conditions and practices of the Arkansas State Penitentiary system amounted to a violation of the Cruel and Unusual Punishment Clause. 309 F. Supp. at 365. The Court also sustained the claim that unconstitutional racial discrimination and segregation was being practiced in the system. *Id.* at 366. The Court rejected a claim that forced labor in the prisons violated the Thirteenth Amendment. *Id.* at 365.

At the time of the 1970 decision the Arkansas prison system was operated primarily with trusty prisoners serving as guards and with very few free world employees. 309 F. Supp. at 373. The three principal units in the system were the Cummins Farm, the smaller Tucker Intermediate Reformatory and the small Women's Reformatory located on the Cummins Farm. *Id.* at 366. At the largest institution at Cummins only 35 free world employees were in "ostensible charge of slightly less than a thousand men." *Id.* at 373. "Of these 35 only 8 were available for guard duty, and only 2 of them were on duty at night." *Ibid.* The trusty guard system, the confinement of inmates in large open

(footnote continued from preceding page)

> right to be free from arbitrary and capricious denial of rehabilitation opportunities, (d) the right to minimal due process safeguards in decisions determining fundamental liberties, (e) the right to be fed, housed and clothed so as not to be subjected to loss of health or life, (f) the right to unhampered access to counsel and the courts, (g) the right to be free from the abuses of fellow prisoners in all aspects of daily life, (h) the right to be free from racial segregation, (i) the right to be free from forced labor, (j) the right to be free from the brutality of being guarded by fellow inmates."

(309 F. Supp. at 364).

barracks, bad conditions in the isolation cells, an absence of a meaningful program of rehabilitation and other aspects of prison life were held in combination to create an unconstitutional system. The Court said:

> "For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world that is administered by criminals under unwritten rules and customs completely foreign to free world culture.
>
> After long and careful consideration the Court has come to the conclusion that the Fourteenth Amendment prohibits confinement under the conditions that have been described at the Arkansas Penitentiary System as it exists today, particularly at Cummins, is unconstitutional.
>
> Such confinement is inherently dangerous. A convict however cooperative and inoffensive he may be, has no assurance whatever that he will not be killed, seriously injured or sexually abused. Under the present system the State cannot protect him.
>
> Apart from physical danger, confinement in the Penitentiary involves living under degrading and disgusting conditions . . .
>
> * * *
>
> It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. It is one thing for the State not to pay a convict for his labor; it is something else to subject him to a situation in which he has to sell his blood to obtain money to pay for his

> own safety, or for adequate food, or for access to needed medical attention." (309 F. Supp. at 381).

With respect to the isolation cells at Cummins the 1970 opinion found that while the overcrowding noted in *Holt I* "seems to have been ameliorated; the other conditions still exist." 309 F. Supp. at 378. The Court noted the planned construction of a new maximum security unit at Cummins, and stated that the operation of the unit by trustys was a source of constant trouble. *Ibid.* However the Court concluded that since overcrowding had been relieved and many of the conditions were due to the conduct of the inmates, the isolation cells were not as serious a constitutional problem as other aspects of the penitentiary. The Court ordered an end to the system of trusty guards in the isolation cells and in addition ordered that food service be made more sanitary and palatable. 309 F. Supp. at 384-385.

On appeal by the defendants the Court of Appeals affirmed. *Holt v. Sarver,* 442 F.2d 304 (8th Cir. 1971). The Court of Appeals rejected the defendant's argument that the case was a suit against the State barred by the Eleventh Amendment, the Court relying on *Ex parte Young,* 209 U.S. 123 (1908). The Court held that jurisdiction was properly invoked to enforce the Eighth Amendment under 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343(3). The Court rejected the argument that the record did not support the District Court's findings of an Eighth Amendment violation. On remand the District Court held further hearings in November and December 1971 and entered a supplemental decree dated December 30, 1971. A. 78. The Court noted that there had been great progress in making the system a constitutional one; that there were still problem areas

and that the court should retain jurisdiction. A. 78. The Court supplemented the earlier injunctions by provisions which enjoined any cruel and unusual punishments, enjoined interferences with inmates' access to the courts and to counsel, and enjoined reprisals against inmates for exercising their right to access to the court. *Ibid.*

D. *Holt III* – Litigation in 1973 and 1974

The *Holt III* proceedings are described in the opinion of August 13, 1973, *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), affirmed in part, reversed in part, *sub nom. Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). On September 8, 1972 the Court filed a memorandum and order noting that it was receiving a constant stream of complaints which gave the court concern that inmates were beaten and abused and otherwise mistreated in violation of the Court's prior orders. A. 81. Ultimately the Court consolidated 34 individual and class actions with the pending *Holt* proceeding and held evidentiary hearings in November and December 1972 and January 1973.

In the opinion issued August 13, 1973, Judge Henley found that the prison system had undergone substantial changes. The trusty system had been essentially dismantled, and a new maximum security building (the East Building) had been built at Cummins. The Court held that a number of conditions at Cummins and Tucker were undesirable but no longer unconstitutional and that the main difficulties resulted from poor administration. 363 F. Supp. at 201-202. The Court did

order further injunctive relief to deal with various problems of racial discrimination including prohibiting undue restrictions against Black Muslims, prohibiting the continued racial segregation of inmates in the maximum security unit at Cummins and issuing a general injunction to attempt to deal with problems of race discrimination in job assignments of blacks and in punishment of inmates within the institution. 363 F. Supp. 203-205.

With respect to the maximum security unit, the Court found that the cells were not overcrowded, that they were properly lighted and ventilated and that their conditions did not constitute a violation of the Eighth Amendment. 363 F. Supp. at 208. The Court also refused to enjoin the continued diet of grue in the punitive isolation cells. *Ibid.* The Court concluded that it was not necessary for it to continue to retain further supervisory jurisdiction. 363 F. Supp. at 216.

The Court granted a request from Messrs. Holt and Kaplan that they be awarded a counsel fee. The Court granted a fee of $8,000 plus $502.80 to reimburse them for money paid to law students and directed that the members of the Board of Corrections make those payments out of available department funds. 363 F. Supp. at 217. These orders were embodied in a Second Supplemental Decree issued August 13, 1973. A. 109.

The plaintiffs appealed from the Second Supplemental Decree and on appeal the Eighth Circuit found continuing constitutional violations and ordered the District Court to continue to retain jurisdiction:

> "This Court recognizes the difficult issues the District Court has passed upon since the commencement of this litigation in 1969. We are

nevertheless compelled to find on the basis of the overall record that there exists a continuing failure by the correctional authorities to provide a constitutional and, in some respects, even a humane environment within their institutions. As will be discussed, we find major constitutional deficiencies particularly at Cummins, in housing, lack of medical care, infliction of physical and mental brutality and torture upon individual prisoners, racial discrimination, abuses of solitary confinement, continuing use of trusty guards, abuse of mail regulations, arbitrary work classifications, arbitrary disciplinary procedures, inadequate distribution of food and clothing, and total lack of rehabilitative programs. We are therefore convinced that present prison conditions, now almost five years after *Holt I*, require the retention of Federal jurisdiction in the granting of further relief." (505 F.2d at 200).

With respect to the punitive wing the Court noted that prisoners were denied the regular prison diet and served grue as a form of further punishment. The Court of Appeals noted that while the District Court thought that grue constituted a nutritionally sufficient diet, it found that conclusion "dubious." 505 F.2d at 207. The Court directed the District Court to ensure that prisoners in the punitive wing are "not deprived of basic necessities including light, heat, ventilation, sanitation, clothing, and a proper diet." 505 F.2d at 208.

E. *Graves v. Lockhart* – 1973-1974 Proceedings

Proceedings in the *Graves* Case are described briefly in an unreported opinion filed on September 29, 1977. A. 198. *Graves* was initiated in late 1973 and consisted of two consolidated complaints filed by Willie Graves and other prisoners who complained of race discrimination and other types of mistreatment in the punitive wing at the Cummins Prison. *Graves* was filed during plaintiffs appeal from the *Holt III* determination that there was no constitutional violation in the punitive wing. In early 1974 the district court appointed Philip McMath, Esq. to represent the prisoners in *Graves*, and conducted a trial of about six days. (Only one day's testimony from this hearing has been transcribed to date). The district court stated in the subsequent memorandum opinion of September 29, 1977 that, as the case progressed "it became clear that the issues raised by petitioners in these cases were in large measure the same issues that had been raised and considered in *Holt III* which was then pending on appeal, and that no useful purpose would be served by undertaking to decide these cases until the court of appeals should decide that case." A. 200. After the Court of Appeals's decision in *Finney* was announced in October, 1974 the district court consolidated *Graves* with the *Holt-Finney* litigation. The evidence in *Graves* was thus considered as a part of the record in the subsequent *Finney* proceedings described below. Mr. Philip McMath, the appointed attorney in *Graves* was awarded an attorney's fee in the subsequent *Finney* decision which is now being reviewed in this Court. The injunctive relief granted in *Finney-Holt* was considered

applicable to the *Graves* case. The individual damage claims of the plaintiffs in *Graves* were subsequently dismissed in the memorandum opinion of September 29, 1977. A. 204.

F. *Finney v. Hutto*, – Proceedings 1975-1977

The proceedings in the district court after the 1974 Eighth Circuit remand are described in the Memorandum Opinion of March 19, 1976 reported as *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976). See also the Clarifying Memorandum Opinion filed April 2, 1976, which is unreported. A. 188. These decisions were affirmed by the Eighth Circuit January 6, 1977, *sub nom. Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977).

The March 19, 1976 opinion reviews the evidence taken in extensive hearings before the District Court and before a United States Magistrate during 1975.[8] Judge Henley stated that the court "recognizes that it should not embroil itself unreasonably in the affairs of the department" and that "much must be left to the discretion of the prison administrators." 410 F. Supp. 254. However, the opinion stated that constitutional deprivations continued to exist and that the court must grant appropriate relief. The opinion, which covers

[8]The hearing before the Magistrate was treated as depositions. 410 F. Supp. at 253 note 2. The hearings in open court in 1975 have not been transcribed by the court reporter. 410 F. Supp. at 285, note 14. The same is true of most of the 1974 *Graves* transcripts.

some 35 pages in the official reports, contains separate sections discussing the following subjects: "Overcrowding", "Medical Services and Health Care", "Rehabilitation", "Regulations as to Mail and Visitors", "Legal Assistance to Inmates", "Inmate Safety", "Race Relations in General", "Racial Discrimination", "Grievance Procedure", "The Black Muslims", "Brutality", "Disciplinary Procedures", "Punitive Isolation and Administrative Segregation", "The East Building at Cummins", "Attorney's Fees and Expenses", and "Procedural Details". The court issued its Third Supplemental Decree on March 19, 1976. A. 177. See also the Clarifying Memorandum Opinion of April 6, 1976. A. 188.

With respect to overcrowding the Court found that conditions in 1975 were worse than in either 1973 or 1974, although after the 1975 hearings conditions were alleviated substantially. The court granted extensive additional injunctive relief as to a variety of prison conditions.[9] 410 F. Supp. at 254-257. With particular

[9]With respect to health care, the Court ordered a new study to be made by the Arkansas State Board of Health of medical facilities at Cummins and Tucker, ordered the employment of one or two full time psychiatrists or clinical psychologists at the prison hospital, and issued an order prohibiting the disciplinary committee from punishing inmates for malingering or pretending illness to avoid work unless the disciplinary committee had consulted with a doctor who examined the inmate prior to making such a finding. 410 F. Supp. at 258.

The Court approved the changes made by the Corrections Department in establishing a rehabilitation program, approved the newly adopted regulations as to mail and visitors and the procedure for furnishing legal assistance to inmates by a full time legal adviser employed by the Department. *Id.* at 262. The Court found inmates were no longer used as armed guards in the State

(continued)

reference to the punitive isolation cells the Court found that the East Building at Cummins was overcrowded, that cells designed to house only one prisoner had been used to house three or four men and that the East Building "has been chronically overcrowded and that something must be done about the situation" 410 F. Supp. at 257.[10] The Third Supplemental Decree set

(footnote continued from preceding page)
prison system and that inmate safety had been substantially improved. *Id.* at 263. With respect to race relations, the Court ordered a program to recruit more black employees and put blacks in positions of meaningful authority in the prison system. *Id.* at 265-268. In addition to the previous orders prohibiting discrimination against Black Muslims the Court enjoined the defendants from serving Muslims any food which contained pork; this applied in maximum security cells as well as in general population. *Id.* at 269-270. With respect to brutality against inmates, the Court supplemented its prior decrees prohibiting tortures and other brutal treatment by an additional injunction prohibiting employees of the Department "from verbally abusing, or cursing, inmates, and from employing racial slurs on epithets when addressing or talking with inmates." *Id.* at 272. With respect to disciplinary procedures adopted by the defendants to comply with *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court added a prohibition against a charging officer sitting in judgment on his own complaint. *Id.* at 272-274.

[10]A report prepared by the defendants in response to the Third Supplemental Decree issued by the court contains a description of the Cummins facility including the East Building. The report states, "There are 22 rooms in the punitive wing, designed to house one inmate per room, but convertible to two-man rooms in an emergency." See, Commissioners' Report to the Court as directed in the Third Supplemental Decree Attachment, #8, p. 46 (July 14, 1976). In answers to interrogatories the defendants acknowledged that each had one bunk, one toilet, and one sink. See Answers to Interrogatories Propounded to Defendants (May 3, 1974) at page 6, A. p. 226. The defendants also admitted that up to three inmates were confined in these one-man cells. See Defendants' Response to Request for Admissions of Fact (May 3, 1974) page 3, A. 219.

maximum capacity limits for Cummins and Tucker prisons, and approved the capacities of individual housing units at Cummins and Tucker as set forth in a report from the defendants. For the maximum security cells at Tucker and all cells in the East Building at Cummins the court entered an injunction restraining defendants from confining more than two persons in any maximum security cell at the same time, and requiring that each person be provided with a bunk and mattress on which to sleep at night, subject to exceptions for "cases of serious emergencies involving large numbers of violent or unruly inmates." A. 179. The Clarifying Memorandum Opinion permitted full use of certain four-man cells, however, the Court provided that inmates in "punitive isolation" should not be confined with more than two men in a cell. A. 189.

Pursuant to the mandate of the Eighth Circuit, the Court conducted an extensive further inquiry into conditions in punitive isolation in the East Building at Cummins. 410 F. Supp. at 274-281. The Court also examined conditions at Tucker Prison and in the other two wings of the Cummins East Building where prisoners are held in segregation pending trial in one wing and in maximum security in the third wing. After considering testimony heard in *Graves* in 1974 and the consolidated cases in 1975 and conducting the Court's own inspection of the punitive cells and the administrative segregation cells of both Cummins and Tucker, Judge Henley reversed his prior ruling and concluded that the conditions were unconstitutional. Judge Henley decided that either conditions were not as good in 1973 as he had thought at that time or the conditions had deteriorated since that period. 410 F. Supp. at 275.

"Whichever may be the case, the Court now find from the evidence that unconstitutionalities now exist with respect to both punitive isolation and administrative segregation, . . ." *Ibid.* The Court found that an inmate sentenced to punitive isolation was confined "in an extremely small cell under rigorous conditions for an indeterminative period of time with his status being reviewed at the end of each fourteen day period." *Ibid.* The Court found that while most inmates sentenced to punitive isolation were released in less than fourteen days "many remained in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel."[11] *Ibid.* The Court

[11]The regulations of the Arkansas Department of Corrections dealing with Disciplinary Procedures (see Enclosure #5 of the Answer to Interrogatory #8, attached to the Answers to Interrogatories propounded to Defendants) provided:

"*Punitive Segregation*

Punitive segregation is ordinarily used as punishment when reprimands, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results. Punitive segregation is a major disciplinary measure and should be used judiciously when all other forms of action prove inadequate, where the safety of others is concerned, or when the serious nature of the offense makes it necessary.

Forms of Segregation

Segregation may take any one of the following forms:

1. *Punitive Segregation – special punishment –*

Confined inmates in a punishment status, placed on a restricted diet, with loss of privileges and placed in special facilities for a comparatively brief period. Ordinarily no inmate should be retained in punishment segregation on restrictive diet more than 15 days, and normally a shorter period is sufficient. Punitive segregation is *not* for indefinite or permanent segregation.

(continued)

found that such prisoners were rarely confined in the cell alone and that at times three or more inmates were kept in the small cell equipped with extremely limited facilities. Where three or more men were put in the same cell, one or two of them had to sleep on the floor.[12] The mattresses were removed during the day. *Id.* at 275-276.

The Court reviewed the diet of grue served as a punishment to inmates in punitive isolation in light of the Court of Appeals remand and concluded that it should no longer be served. *Id.* at 270-277. Inmates were fed grue during each fourteen day period, except that on every third day they were supposed to receive one regular prison meal. *Ibid.* Many inmates complained of short rations for this meal and of a practice

(footnote continued from preceding page)

A. Regular punitive segregation procedures

(1) Period of Confinement:

Fifteen days should be the maximum time spent in punitive segregation.

Recalcitrant inmates at the end of this period should be fed a normal diet. After two or three days, depending upon physical condition, he may be returned to a restricted diet and the procedure continued."

Department of Corrections officials interpreted the regulation as allowing an inmate to be kept in punitive isolation indefinitely as long as he was given regular meals for two days every 15 days. See, Testimony of A. L. Lockhart, Extract of Proceedings in *Graves v. Lockhart*, pp. 95-96, 100.

[12]See Defendants' Response to Request for Admission of Fact (May 3, 1974) page 3, A. 219.

known "as shaking the spoon". *Id.* at 276, note 11. At the end of each fourteen days inmates were weighed to determined how much weight they had lost on the grue diet and if returned to punitive isolation were given regular food for two days before being returned to the grue diet on the seventeenth day. Virtually all inmates lost weight on this diet.[13] Id. at 276, note 12. Inmates were allowed very limited outdoor exercise and left their cells on every third day to take a shower. Inmates in punitive isolation were denied practically all privileges; they could receive visits only from clergymen which were very rare and could receive only "constitutionally protected" mail.[14] The Court found the punitive wing was frequently the scene of violence with prisoners screaming and cursing at guards, attempting to assault and injure them and the guards retaliating with night sticks and mace, frequently with excessive responses.[15] Id. at 276-277. The Court criticized the

[13]Defendants admitted that the caloric value of the grue served each day was approximately 962 calories, Answers to Interrogatories Propounded to Defendants (May 30, 1974), p. 7, A. p. 227, and that "plaintiffs, while inmates in the 'punitive wing' of the Cummins Prison Farm, have generally and uniformally [sic] suffered weight loss." Defendants' Response to Request for Admission of Fact (May 3, 1974) p. 2, A. p. 218.

[14]It was admitted that inmates were not allowed to receive personal mail while serving time in the punitive wing. Defendants' Response To Request For Admission of Fact (May 3, 1974), p. 3, A. p. 219.

[15]Much of the testimony, including that of defendants' witnesses, related to various incidents of violence in the punitive wing. See, e.g., the testimony of A. L. Cummins, in the Extract of Proceedings in *Graves v. Lockhart*, at pp. 47-53.

lack of professionalism and commonsense among the maximum security personnel. *Id.* at 277. The Court agreed with the testimony of Dr. Arthur Rogers, a clinical psychologist, who testified as plaintiff's expert in the 1974 *Graves* hearings that punitive isolation as practiced at Cummins "serves no rehabilitative purpose, and that it is counterproductive. It makes bad men worse. It must be changed."[16] *id.* at 277.

The Third Supplemental Decree prohibited the continued use of grue and required that inmates be served food of the same quality as that supplied to inmates in the general population. The Court ordered that defendants provide inmates in punitive isolation further opportunity for physical exercise outside their cells. Finally, the Court enjoined the confinement of inmates in punitive isolation for indeterminate periods. The[17] Court's decision was that indeterminate periods

[16]See, generally, the testimony of Arthur Rogers, set out in the Extract of Proceedings in *Graves v. Lockhart*, at pages 3-20.

[17]The Third Supplemental Decree provided (A. 183-185):

"*Punitive Isolation.*

Respondents will be, and they hereby are, enjoined from sentencing inmates of the Departments to confinement in punitive isolation for indeterminate periods of time. In the future an inmate who is convicted of a major disciplinary infraction may be sentenced to confinement in punitive isolation for a period of not more than thirty days; at the end of that maximum period he must be returned to general population, or, if it be found necessary, he may be held in a segregated status under maximum security conditions other than punitive. No disciplinary committee or panel is required to sentence an inmate to confinement in punitive isolation for as much as thirty days, and the Superintendent of the institution or the Commissioner is free to release an inmate from punitive isolation at any time prior to the expiration of his sentence.

(continued)

of confinement under these conditions was unreasonable and unconstitutional. 410 F. Supp. at 278. The

---

(footnote continued from preceding page)

Inmates who have been confined in punitive isolation for more than thirty days when this Decree is filed are to be released to population or held in maximum security but under conditions that are not punitive. Inmates who have not been confined in punitive isolation for thirty days or longer will be considered as serving sentences of not more than thirty days. In determining whether an inmate has been in isolation for thirty days or longer, the two day periods of "interruption" mentioned in the Opinion will be included in the calculation.

Respondents will be, and they hereby are, enjoined from supplying inmates confined in punitive isolation with food and water inadequate in quantity and quality to preserve their health, and are further enjoined from serving such inmates diets which differ qualitatively from food supplied to inmates in general population. Without limiting the generality of the foregoing, the use of the substance known as "grue", or any variant thereof, as a food for inmates in punitive isolation is specifically enjoined.

Respondents will be, and they hereby are, directed and required to afford inmates in punitive isolation reasonably adequate opportunites for physical exercise outside their cells, including reasonable amounts of outdoor exercise when weather permits.

Lest there be any mistake about the matter, respondents will be, and they hereby are, enjoined from confining in any cell in any of the three wings of the East Building at Cummins, in circumstances other than exceptional and then for only short periods of time, more than two men at the same time, and respondents will be, and are, required to provide each man so confined with a bunk and mattress.

Respondents will be, and they hereby are, directed and required to evaluate and periodically re-evaluate the cases of inmates confined in what the court has called the "third wing" of the East Building, (Opinion page 60) as prescribed on pages 62-64 of the Opinion, and to take appropriate actions based on such evaluations and re-evaluations.

Court acknowledged that some inmates must be segregated from the general population for various reasons "and does not condemn that practice". *Ibid.* "But segregated confinement under maximum security conditions is one thing; segregated confinement under the punitive conditions that have been described is quite another thing." *Ibid.* The Court made clear that it was not prohibiting all segregating of unruly prisoners from general population and referred to the Eighth Circuit's controlling decision relating to so-called "administrative segregation", e.g., *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1975). See 410 F. Supp. at 278. Judge Henley based his decision to limit the time in punitive isolation to thirty days on the testimony of Mr. Hutto taken in conjunction with the various changes that were ordered in conditions in that wing. The Court stated:

"As to the length of the maximum sentences that maybe imposed, the court notes that Mr. Hutto is of the view that basically the maximum period of time in which a man should be confined in punitive isolation with a restricted diet, with no mattress in the daytime, and perhaps without a bunk to sleep in at night is fourteen days. In view of the changes in the confinement in punitive isolation that the court is ordering, the court feels that a maximum sentence of thirty days is permissible. If at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but

under conditions which are not punitive." (410 F. Supp. at 276).[18]

The Court pointed out that less than thirty day sentences might be imposed and also that inmates might be prosecuted for felonies if they committed serious crimes while in prison. 410 F. Supp. at 278.

Judge Henley also used the thirty day limit on punitive confinement as a part of the method of dealing with unconstitutional overcrowding. "As far as the punitive wing and the administrative segregation wings of the East Building are concerned, the directives of the Court in the immediately preceding section hereof ought to take care of the problem of overcrowding." 410 F. Supp. at 278.

In the third wing, which would probably be called "administrative segregation" in most institutions but in Arkansas was merely referred to as the "third wing" or "maximum security" wing, the Court also ordered certain changes. Here the Court ordered periodic evaluation of the situation of convicts who could not be safely returned to the general population in accord with the Eighth Circuit's ruling in *Kelly v. Brewer, supra.*

---

[18]Indeed, the report filed by the defendants following the Third Supplemental Decree states that an inquiry showed that there was no one at any institution on punitive isolation who had been there for more than 30 days at the time of the Court's Order. See, Response filed by the Defendants in *Finney v. Hutto*, July 14, 1976, Commissioner's Report to the Court as Directed in the Third Supplemental Decree at p. 5, dealing with punitive isolation.

In the Clarifying Memorandum Opinion of April 2, 1976, the Court responded to an inquiry from the defendants about how to deal with prisoners who committed infractions while in punitive isolation. The Court stated that if an inmate in punitive isolation commits a serious infraction he may be proceeded against in a disciplinary proceeding just as though the offense had been committed by an inmate in the general population. A. 190. If an inmate is found guilty the Court stated he may be sentenced to an additional time in punitive confinement beyond the basic thirty day maximum period specified in the Third Supplemental Decree. *Ibid.* The Court however warned the defendants to move slowly and sparingly in this area, and not to use the major disciplinary procedures followed by consecutive sentences as a means of evading the prohibition against indeterminate sentences. The Court stated that if the imposition of consecutive sentences became a matter of common practice it would be constitutionally suspect and call for additional judicial attention. *Ibid.*

The Court also clarified its order with respect to food to provide that inmates in punitive isolation not be required to be served exactly the same food or the same size portions or have the same choice of dishes as other inmates but the Court did require that inmates be served adequate meals in punitive confinement and warned against the practice of deliberately serving short rations. A. 191-192.

The Court's ruling on attorneys' fees is set forth in 410 F. Supp. at 281-285. The Court noted that Mr. McMath who was appointed in 1974 had received no fee for his work and that Messrs. Holt and Kaplan had

received no fee for their work on the *Holt III* appeal or any subsequent work. The Court noted that its 1973 award of fees had been based in part upon the "private attorney general" theory and that *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) required a reexamination of the Court's power to award such a fee. The Court concluded that the bad faith exception to the American Rule, recognized in *Alyeska*, justified the award of a counsel fee in this case. 410 F. Supp. at 284. The Court noted that the attorneys involved had been in the protracted case only because they had been appointed; that the litigation had been needed to bring about the erratic course of improvement in the Arkansas prison system from 1965 to date; that the litigation brought to light problems which would have been otherwise overlooked; that there had been a hardening of the previously cooperative attitude of the prison administrators and an unwillingness to go forward with necessary improvements; that at "practically every stage of the litigation evidence has brought to light practices of which those in higher prison authority were ignorant, and which they eliminated when the facts were disclosed"; that the authorities should have themselves discovered some of those practices without waiting for them to be developed in the lawsuit by plaintiffs' attorneys. *Id.* at 284-285. The Court stated that in fixing the amount of the fee it was making no effort "to adequately compensate counsel for the work that they have done or for the time that they have spent on the case" because adequate compensation "would run into many thousands of dollars." *Id.* at 285. The Court stated it did wish to

allow more than a nominal fee and accordingly awarded $20,000.00 to be divided between the three attorneys and to be paid out of Department of Corrections funds. The Court also ordered the State to pay for the cost of a transcript of depositions and testimony. The Court noted that much of the testimony heard in 1974 and 1975 had not been transcribed. 410 F. Supp. at 285, note 14.

On appeal by the defendants the Eighth Circuit affirmed on January 6, 1977. *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977). The defendants contested the aspects of the decree which prohibited indeterminate confinement in punitive isolation and which awarded attorneys' fees and costs. The Eighth Circuit accepted Judge Henley's description of the conditions in punitive isolation and affirmed his conclusion that indefinite confinement in those conditions for more than thirty days was cruel and unusual punishment. The Court affirmed the award of attorneys fees reasoning that the award was justified by the recently enacted Civil Rights Attorney's Fee Awards Act of 1976, codified as 42 U.S.C. §1988. The Court reasoned that the award was not barred by the Eleventh Amendment based upon this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court also found that the record fully supported the District Court's finding that the conduct of the defendants justified an award under the bad faith exception enumerated in the *Alyeska* case. 548 F.2d at 742, n. 6. Finally, the Court found the award of costs permissible under the Eleventh Amendment citing *Fairmont Creamery Company v. Minnesota*, 275 U.S. 70 (1927). The Court of Appeals awarded the appointed counsel an additional $2,500.00 for their services on the appeal.

On October 17, 1977, this Court granted a petition for certiorari filed by the defendants *Hutto et al.*

SUMMARY OF ARGUMENT

I. A. The Eighth Amendment limits the prison conditions in which an inmate may be confined. Because the prisoner, by reason of the deprivation of his liberty, cannot provide for himself, prison authorities must furnish such essentials as food, clothing, shelter, sanitary facilities, and medical treatment. *Estelle v. Gamble*, 50 L.Ed.2d 251 (1977).

B. The disputed 30 day limitation on punitive segregation was part of the court ordered remedy for the unconstitutional conditions the District Court found in the punitive facilities in 1976. Petitioners do not question the holding of the lower courts that the 1976 conditions constituted cruel and unusual punishment. The principle elements on which the District Court based its finding of a constitutional violation included severe overcrowding, the lack of an adequate diet, and physical attacks on inmates by guards and other inmates.

C. The District Court did not hold that indefinite punitive segregation was a *per se* violation. The Court merely imposed the 30 day limitation in light of the conditions at the particular punitive facilities involved.

D. The 30 day limitation was reasonably adapted to remedy the proven violation. The 30 day rule limited the extent to which an inmate would be subject to the conditions found by the District Court, many of which would have been difficult to alter directly. The

limitation also lowered the average population in the punitive facilities and thus reduced the degree of overcrowding. This was a less intrusive remedy than attempting to regulate and monitor in great detail the events and practices in the punitive facilities.

II. A. The District Court awarded respondents counsel fees because the defendants had acted in bad faith and directed that petitioners pay that award out of state funds under their control. The finding of bad faith was affirmed by the Court of Appeals and is not questioned here. The general authority of the federal courts to award fees in light of such conduct is well established. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 259 (1975).

The Eleventh Amendment does not preclude such an award of counsel fees. State officials may be directed to make expenditures from public funds under their control so long as that expenditure is "ancillary" to the injunctive relief. *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977). This Court, by its decisions and practice, has long recognized that costs are ancillary and thus may be awarded against a state. *Fairmont Creamery v. State of Minnesota*, 275 U.S. 70. Counsel fees where awardable are traditionally regarded as part of costs. Like costs counsel fees are not the gravamen of an action, are not incurred to a significant degree if the action is resolved immediately after filing, and are not measured in terms of the monetary loss resulting from the defendant's violation of a legal duty.

If, as petitioners contend, counsel fees must be regarded as a form of damages, the state is obligated by Arkansas Act 543 of 1977 to pay such award on behalf of petitioner Hutto.

Respondents maintain that the enactment of the Fourteenth Amendment worked a *pro tanto* repeal of the Eleventh Amendment. If, however, the Court concludes that counsel fee awards are not subject to the Eleventh Amendment, this question need not be reached.

B. The Civil Rights Attorneys Fees Award Act of 1976, P.L. 94-559, was adopted in the wake of the *Alyeska* decision to provide in 42 U.S.C. §1983 cases an express congressional authorization for awards of counsel fees to lawyers acting as private attorneys general. The court of appeals upheld the award of counsel fees in light of this statute.

Although P.L. 94-559 does not specify against whom fee awards are to be made, such awards of costs are traditionally made, not only against the named defendant, but also against an interested party which interjects itself into the case and controls the litigation. *Souffront v. Compagnie des Suceries*, 217 U.S. 475 (1910). In §1983 cases the city or state involved commonly interjects itself into the case in this manner. The House and Senate Reports regarding P.L. 94-559 expressly state that city or state funds should be used to pay counsel fee awards in civil rights actions in which the named defendant is a city or state official.

Congress has the authority under section 5 of the Fourteenth Amendment to subject states to monetary awards in federal court. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The legislative history demonstrates that Congress intended to invoke that authority.

Despite the clear intent and authority of Congress, petitioners urge that Congress failed to frame the statute in a manner sufficient to achieve its purpose.

The decisions of this Court do not require that Congress exercise the power recognized in *Fitzpatrick* through any special technical language. It is sufficient that, as here, the intent of Congress is clear. If petitioners' construction of P.L. 94-559 were accepted state officials would be personally liable for often substantial fees regardless of whether they had acted in good faith or had any control over the conduct of the litigation.

The application of P.L. 94-559 to the instant case is required by the general rule that new legislation be applied to pending litigation. *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). The legislative history of the statute demonstrates that Congress intended that it be so applied. The application of the law to this case involves no "manifest injustice", since petitioners were on notice that such fees might be awarded and do not claim they would have operated the prisons differently had that not been the case.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY FORBADE THE USE OF INDEFINITE PUNITIVE SEGREGATION AS PART OF ITS REMEDY FOR THE UNCONSTITUTIONAL CONDITIONS IN THE PUNITIVE FACILITIES

A. The Cruel and Unusual Punishment Clause of the Eighth Amendment, which limits both how long[19] and whether[20] a person can be sentenced to jail, restricts as well the treatment to which he can be subjected while so incarcerated. The prohibition has not been confined to the barbarous methods of torture and mutilation generally outlawed in the 18th Century, but prohibits practices repugnant to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Confinement in a penitentiary necessarily entails a loss of most of the comforts enjoyed by free men; the very purpose of such incarceration may require that it not be a pleasant experience. But such punishment, if [illegible]t be the goal of incarceration, may not inclu[illegible]cessary and wanton infliction of pain". *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Eighth Amendment "cover[s] conditions of confinement which may make intolerable an otherwise constitutional imprisonment." *Ingraham v. Wright*, 51 L.Ed.2d 711, 729, n. 38 (1977).

---

[19] *Weems v. United States*, 217 U.S. 349 (1910).

[20] *Robinson v. California*, 370 U.S. 660 (1962).

As this Court recognized in *Estelle v. Gamble*, 50 L.Ed.2d 251, precisely because an inmate is incarcerated he must rely on prison authorities to meet his basic needs, for "if the authorities fail to do so, those needs will not be met." 50 L.Ed.2d at 259. *Estelle* held that the Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." *Id.* In *Costello v. Wainwright*, 51 L.Ed.2d 372 (1977), the Court recognized that the overcrowding of prison cells could reach such a degree that the constitution would be violated. The obligation of prison authorities recognized by *Estelle* is not limited to the provision of medical care, but includes all basic necessities of life: food, clothing, shelter, sanitary and washing facilities, and opportunity for a modicum of exercise. Modern standards of decency, as reflected in the practices generally employed and approved by prison authorities, correctional experts, and others[21]

---

[21] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, pp. 31 (clothing, bedding, light, ventilation, food), 34 (shelter, heat, light, showers, exercise) (1973); American Bar Association, Tentative Draft of Standards Relating to the Legal Status of Prisoners, §§6.9 (shelter, physical safety), 6.12 (sanitation, heat, light, food, washing facilities, bedding, exercise) (1977); American Correctional Association, Manual of Correctional Standards, pp. 444-56 (food), 463 (bedding), 463-4 (washing facilities), 519-39 (exercise) (1972); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, §1(b) (food, shelter, physical safety, sanitation, ventilation, light, exercise) (1972); Model Penal Code, §304.5(2) (food, clothing); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, §§9 (shelter, overcrowding), 10 (heat, light, ventilation), 11 (sanitation), 13 (washing facilities), 19

(continued)

insist that society "be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." *Estelle v. Gamble*, 50 L.Ed.2d at 260.[22] A deprivation of such necessities, like a withholding of medical care, is a form of punishment which cannot be resorted to for any offense or infraction.[23]

(footnote continued from preceding page)
(bedding), 20(1) (food), 21(1) (exercise) (1955). National Sheriff's Association, Manual on Jail Administration, §§IX(5) (clothing) XIX (food), XX(ii) (sanitation), XX(12) (washing facilities), XXI(8) (exercise) (1970).

The United States is committed by the Geneva Convention to providing such necessities to prisoners of war. 6 United States Treaties 3317, 3328 (humane treatment, protection against violence), 3334 (food, water, clothing), 3336 (hygienic and healthful shelter), 3338 (bedding, blankets, housing, light, heat), 3340 (food, water, clothing), 3342 (sanitation), washing facilities, 3348 (exercise) (1949).

[22]The lower Federal courts have concurred in that assessment. See, e.g., *Newman v. Alabama*, 559 F.2d 283, 286, 291 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291, 1302, 1305 (5th Cir. 1974). Although these cases are primarily concerned with conditions which may produce physical suffering, Judge Feinberg has correctly observed that "In this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution." *Sostre v. McGinnis*, 442 F.2d 178, 208 (2d Cir. 1971) (dissenting opinion).

[23]Such a deprivation, like the use of torture, has no place in any part of a prison. Thus it is of no significance to this case that deprivations of this character occurred in punitive isolation rather than in other parts of the prisons. Since punishment of this sort is absolutely prohibited, the Court need not consider whether it was an excessive sanction for any class of disciplinary infractions, see *Coker v. Georgia*, 53 L.Ed.2d 982 (1977), or whether any particular infractions could not constitutionally be punished at all. *Robinson v. California*, 370 U.S. 660 (1962).

Unlike other constitutional questions concerning the operation of prisons, enforcing minimal standards of food, clothing, shelter and the like will not ordinarily affect the responsibilities of prison administrators "for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974). Any impact of the elimination of brutalizing conditions is likely to be, as the District Court found here, conducive to the increased efficiency and safety of the institution. This is true, not only because giving an inmate a wholesome diet or a bed to sleep on will not encourage or facilitate a breach of security, but because ordinarily a prison's failure to do so arises not from such traditional administrative concerns but from a shortage or misallocation of resources or a breakdown in centralized control of the prison staff. In the instant case, for example, the uniquely deplorable conditions discovered in 1969, including the use of armed convicts as guards, was the result of the refusal of the Arkansas legislature to appropriate any funds whatever for the operation of the prison system, which was forced to operate from the proceeds of convict labor. 309 F. Supp. at 372-381. The District Court proceedings and other developments led to the appropriation of such funds which in turn enabled the prison authorities both to comply with the Constitution and to operate the prison in a manner more consistent with their professional judgment. The Constitution does not require the states to establish and operate prisons, but where they choose to do so they must provide the

resources necessary to fall within the limits set by the Eighth Amendment.[24]

Neither this nor other cases concerning the provision of basic necessities for prisoners involves a possible thwarting of the judgment, of particular importance under Eighth Amendment, of the people or legislature of the State involved. See *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976). No state statute required the particular conditions found at Cummins or Tucker. State laws touching on the conditions of confinement generally set minimum, not maximum, standards; some like those of Arkansas[25] are generalized requirements of decent treatment, while others are more detailed.[26] Where, as in Arkansas,[27] those statutes are supplemented by administrative regulations, the regulations

---

[24]See *Gates v. Collier*, 501 F.2d 1291, 1319-22 (5th Cir. 1974).

[25]Ark. Stat. Ann. §46-116 requires that "Persons committed to the institutional care of the Department shall be dealt with humanely with efforts directed to their rehabilitation."

[26]See, e.g., New York Corrections Law §137 (1977 Supp.).

[27]The operation of all jails and prisons, including those under the control of the Department of Corrections, is subject to the rules and regulations of the Arkansas Criminal Detention Facilities Board, which is charged by statute with the obligation "[t]o develop minimum standards for the construction, maintenance and operation of such criminal detention facilities." 4A Ark. Stat. Anno. §§46-1201, 1204(f) (1975 Supp.). The conditions condemned by the district court appear to have violated the Board's standards as well as the Eighth Amendment. See notes 30-32 *infra*. See also *Wright v. McMann*, 460 F.2d 126, 131 (2d Cir. 1972), *cert. denied* 409 U.S. 885 (1972).

contain minimum rather than maximum standards. Thus in litigation regarding the constitutionality of prison conditions, those conditions do not ordinarily come with the imprimatur of societal endorsements which exists in the case of punishments adopted by a legislature. *Gregg v. Georgia*, 428 U.S. at 179-80. Because prisons, unlike other institutions, are usually operated on a closed basis with little opportunity for scrutiny by the public[28] or legislature, the severity of those conditions is rarely tested against community standards, and the judicial enforcement of the prohibition against cruel and unusual punishment will frequently be the only meaningful check on abuses inconsistent with the standards of decency embodied in the Eighth Amendment and prevalent in the community in which the prison operates. See *Ingraham v. Wright*, 51 L.Ed.2d 711, 729-30 (1977).

Application of the constitutional requirements to the circumstances at a particular facility will raise a variety of factual and legal issues. Some practices, such as the deliberate withholding of medical attention, are *per se* violations of the Eighth Amendment. *Estelle v. Gamble*, 50 L.Ed.2d 251 (1977). Assessing other possible abuses, such as an alleged inadequacy of food or heat, will involve a question of degree. In other cases, although no single practice may violate the Constitution, the combined effect of several practices may do so. *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974). Some

---

[28]See *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977) ("We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case").

conditions, while not unconstitutional as a general practice, may be intolerable as applied to a particular inmate; thus although there is nothing wrong in the abstract with prison diet rich in sugar, it would be cruel and unusual punishment to provide only such food to a diabetic inmate. See *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971).

B. The District Court concluded that the conditions which existed in 1976 in punitive segregation constituted cruel and unusual punishment. That conclusion was reached reluctantly, and was based on many weeks of hearings over seven years which, together with at least one personal inspection of the prison facilities involved, gave the District Judge a unique knowledge of the facts. The District Court's conclusions were upheld by the Court of Appeals, which had also acquired a familiarity with the Arkansas prisons through a series of previous appeals in this and other cases. Petitioners do not here challenge the concurrent determination of the two courts below regarding the nature of punitive segregation as of 1976. In order, however, to assess the propriety of the 30 day limitation, it is necessary to review the circumstances which gave rise to the finding of a constitutional violation.

The problems with which the District Court was particularly concerned were overcrowding,[29] an inade-

[29]Overcrowding which serves no conceivable penological purpose, is among the most common causes of unconstitutional prison conditions. See, e.g., *Costello v. Wainwright*, 51 L.Ed.2d 372 (1977); *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206, 1211, 1215 (5th Cir. 1977).

quate diet and pervasive violence. Although the cells in the punitive wing at Cummins were originally designed for one inmate each, see n. 19, *supra*, and had at most two beds, *id.* at 275-276, they were at times used to house three or four inmates.[30] Thus frequently one or two inmates were required to sleep on the floor. The Court noted that:

> [convicts] being what they are, that means that the stronger and more aggressive inmates are going to occupy the bunks, and they are also likely to persecute the weaker inmate or inmates. A variant of this is that where three convicts are confined in a single cell, two of them are apt to team up against the third one. 410 F. Supp. at 276.

The "grue" fed to inmates was alleged to contain ingredients sufficient for adequate nutrition, but the amount of grue served together with 4 slices of bread provided only 962 calories a day.[31] Although this diet

[30]The Adult Detention Facility Minimum Standards for long term facilities, promulgated in December 1975 by the Arkansas Criminal Detention Facilities Board, provided in part: "The design of buildings should provide single occupancy rooms with a floor area of at least (70) seventy square feet per room and a clear floor-to-ceiling height of (8) eight feet in the interior." §15-1023, p. 48. See n. 27, *supra*.

[31]The average adult male needs between 2200 and 2900 calories a day. The American Correctional Association Manual of Correctional Standards urges that prisoners in punitive segregation receive at least 3,100 calories a day. P.420 (1972). The National Council on Crime and Delinquency's recommended standards for prisoners in solitary confinement would require at least 2500 calories a day. Model Act for the Protection of Rights of Prisoners, §3(a) (1972). See also *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (requires at least 2000 calories a day for prisoners in solitary confinement).

was supplemented every third day with a regular meal, there was substantial evidence that the guards deliberately gave only a partial serving of that meal to some inmates. 410 F. Supp. at 276, n. 11. Practically all inmates on a grue diet in punitive isolation lost weight. The extent to which this loss was due to the nutritive value of grue, and/or to the inability or unwillingness of inmates to eat that deliberately unappetizing paste-like concoction, is unclear.[32] Petitioners themselves recognized that the actual nutritional intake of inmates in punitive segregation was such as to require a thorough physical examination every two weeks. 505 F.2d at 207. The Court of Appeals had earlier compared grue to a bread and water diet which was "not seriously defended as essential to security . . . [and] amount[ed] therefore to an unnecessary infliction of pain." 505 F.2d at 207, n. 9. It is clear that the use of grue served no purpose other than to punish inmates through a form of controlled but chronic malnutrition; the role of the medical personnel was not to prevent this partial starvation, but merely to

[32]Section 10-1001 of the Adult Detention Facility Minimum Standards, *supra*, n. 27, states: "A good food program shall be one of the Facility administrator's primary concerns; because of its effect on health, welfare, discipline and morale. . . . The inmates' food shall provide the nutrients needed for optimum health and should be plentiful and of a wide variety, well prepared, and well served." P. 37.

assure that it did not cause death or permanent injury.[33]

The Court also found that its previous injunctive orders had apparently been disobeyed. Despite an earlier prohibition against brutality, it concluded prison guards continued to use excessive force. 410 F. Supp. at 277. Notwithstanding a prior directive that Muslim inmates enjoy the same right to practice their religion, and meet with clergy, as inmates of other faiths, there was substantial evidence that discrimination against them continued. 410 F. Supp. at 280-81. Although racial discrimination against inmates had already been prohibited, the Court felt that covert discrimination had not ended. 410 F. Supp. at 268. The District Court noted a number of other practices which aggravated these more pronounced abuses, including a lack of repairs, inadequate training and rotation of guards, and the employment of an overwhelmingly white work force to run the heavily black prisons. 410 F. Supp. at 265-68, 277, 280. The Court also noted that the overcrowding and sanitary conditions in the punitive wing contributed to the spread of contagious diseases. 410 F. Supp. at 258-9.

[33]The special diet, even if nutritionally adequate, would still present serious constitutional difficulty. Forcing inmates to eat food deliberately prepared in an offensive or unpalatable manner is a form of punishment offensive and largely unknown to civilized practice. The "recipe" for grue is similar to the practice condemned by the American Correctional Association of "Mix[ing] several types of foods together in a dish so that the prisoner's fare closely resembles a meal set out for an animal to eat." *Manual of Correctional Standards*, p. 420 (1972).

The injunctive relief awarded by the District Court was considerably narrower than the wide range of practices which gave rise to the constitutional violation. The Court forbade the housing of more than two men in a one-man cell except in an emergency,[34] stopped the serving of grue and directed the petitioners to provide inmates with a nutritionally adequate diet,[35] and limited the period during which an inmate could be confined in punitive isolation to 30 days.[36] The Court reaffirmed, but did not significantly expand, its previous injunction against racial and religious discrimination. The petitioners were instructed to "do more" about recruiting minority guards, but were left free to decide how this should be done. The Court ordered the petitioners to arrange for a study for the medical and sanitary conditions at the prisons, including the punitive wing at Cummins, but again the petitioners were made initially responsible for framing the study and implementing any resulting recommendations. Although the District Judge made clear his concern that changes were necessary in other areas, the court's injunction did not require the petitioners to take any specific action regarding the rotation, training, or number of guards, or the repairing of broken or worn out facilities, and merely noted the Court of Appeals' concern about the levels of light, heat and ventilation. Thus, to a substantial degree the District Court continued its earlier approach of noting the existence of constitutionally suspect practices but refraining from issuing

[34]410 F. Supp. at 277.

[35]410 F. Supp. at 277.

[36]410 F. Supp. at 278.

detailed injunctive requirements in the hope that petitioners would act without them.[37]

C. There are a number of important issues of constitutional law which, although suggested by petitioners' brief, are not presented by this case and were not the subject of the proceedings below.

This case does not present the question of whether indefinite punitive segregation is unconstitutional *per se*.[38] The district court was not asked to fashion, and did not adopt, any such *per se* rule. Its opinion declared only that "segregated confinement under the punitive conditions that had been described" in its exhaustive opinion violated the Eighth Amendment. 410 F. Supp. at 278. The primary if not exclusive impact of this decision is on the operation of the East Building at the Cummins facility.[39] While other lower courts in other cases have been asked to declare such indefinite isolation impermissible in all cases, no such determination was made in this case. Even those courts

[37]We do not suggest that this approach was necessary or even proper. On the contrary, while a district court may properly invite prison officials to submit a remedial plan, and take note of their comments on plans that may be prepared by another party or the court, the court must assure that some plan to remedy the constitutional violation is put into effect as soon as practicable after the finding of liability. See *Green v. School Board of New Kent County*, 391 U.S. 430, 439 (1968).

[38]The petition for writ of certiorari, and petitioners' phrasing of the Third Question Presented, may have suggested this was the substantive issue in controversy.

[39]At the time of the court's opinion only 3 inmates were in punitive isolation at Tucker. See note 18 *supra*.

which have addressed that issue and concluded that indefinite segregation is not unlawful *per se* have emphasized that such segregation might be unconstitutional "depending on the conditions of segregation". *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971).

There is no dispute in this case as to whether the 30 days of punitive isolation permitted by the District Court is too short to serve as adequate punishment for any particular major infraction.[40] If, as we urge *infra*, some limit on the use of punitive segregation was appropriate, petitioners do not urge that a period other than 30 days should have been chosen. On the contrary, petitioners' own internal regulations prohibit the imposition for a particular offense of more than 15 days of punitive isolation. See, note 11 *supra*. The maximum period set by the District Court was consistent with those suggested by corrections experts.[41] As the District Court noted, its order does not

[40]Petitioners' Notice of Appeal limited the substantive issue on which review was sought to those portions of the district court orders which "prohibit the sentencing of inmates to confinement in punitive isolation for indeterminate periods of time for major disciplinary infractions." Although this suggested that petitioners sought on appeal only the right to impose a sentence over 30 days *for a particular infraction*, petitioners, as we note, have never had such a practice.

[41]See, e.g., American Correctional Association, Manual of Correctional Standards, 414-15 (maximum 15 days); American Law Institute, Model Penal Code §304.7(3) (Proposed Official Draft 1962) (Maximum 30 days); American Bar Association, Standards Relating to the Status of Prisoners (Tentative Draft), §3.2(a)(iii) (30 days). National Advisory Commission Criminal Justice Standards and Goals, Corrections, p. 31 (10 days).

The maximum period of punitive confinement permitted by the Geneva Convention Relative to the Treatment of Prisoners of War is also 30 days. 6 United States Treaties 3317, 3364 (1949).

interfere with the use of administrative segregation or criminal prosecution to punish offenses in lieu of, or in addition to, up to 30 days of punitive isolation. 410 F. Supp. at 278.

The District Court's order presents no significant limitation on the ability of petitioners to punish a series of major infractions. Ten days after the District Court entered the lengthy opinion of March 19, 1976, reported at 410 F. Supp. 251, petitioners filed a Motion to Alter or Vacate. Item IV of that motion stated:

> Respondents respectfully request that the Court clarify its injunction prohibiting incarceration of inmates on punitive [segregation] not to exceed thirty days. The respondents are unclear as to the proper procedure to follow if an inmate commits a new disciplinary offense warranting an additional sentence of punitive segregation while incarcerated in punitive segregation.

The District Court issued a Clarifying Memorandum Opinion on April 2, 1976, making clear that the petitioners could impose successive sentences for successive major infractions:

> If an inmate confined in punitive isolation or punitive segregation commits while so confined a serious or major disciplinary infraction, and particularly one involving violence or attempted violence directed at prison personnel or other inmates or one involving serious vandalism directed against state property, the inmate may be proceeded against in a major disciplinary proceeding, with notice and hearing, just as though the offense had been committed by the inmate while living in general population. And if he is found guilty he may be sentenced to additional time in

> punitive confinement, which time may extend beyond the expiration of the basic maximum thirty day period specified in the court's Third Supplemental Decree.[42]

The District Court cautioned that this authority was not to be abused to circumvent the 30 day limitation.[43]

The practice which was ended by the district court, and which is the subject of this appeal, was one of confining an inmate in punitive isolation for an indefinite period until prison authorities were persuaded that the inmate had developed "the proper attitude". The District Court found that

> [w]hile most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel. 410 F. Supp. at 275.

The petitioners' written Disciplinary Procedures seem to contemplate this exception to their usual 15 day limitation on punitive segregation.

> Ordinarily no inmate should be retained in punitive segregation on restrictive diet more than 15 days, and normally a shorter period if sufficient. Punitive segregation is *not* for indefinite or permanent segregation. . . . Fifteen days should be the maximum time spent in punitive segregation. Recalcitrant inmates at the end of this period should be fed a normal diet. After two or three

---

[42]Clarifying Memorandum Opinion, April 2, 1976, p. 3. A. 188.

[43]*Id*, pp. 3-4. A. 188.

> days, depending upon physical condition, he may be returned to a restricted diet and the procedure continued.[44]

Petitioner Hutto testified that punitive isolation for more than two weeks was used only for inmates who were "recalcitrant" and "hostile".[45] The sole practical effect of the contested portion of the District Court order was to restrict this use of punitive isolation; that order did not prohibit the use of any other methods for dealing with recalcitrant or hostile prisoners.[46] 410 F. Supp. at 278.

We have grave doubts as to the constitutionality of imposing any serious sanctions until an inmate changes a "bad attitude". This Court in *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974), held that an inmate was entitled prior to the use of solitary confinement or other "major changes in the conditions of confinement" to a written notice of charges, a written statement of the evidence relied on, and an opportunity to call witnesses and present documentary evidence. These procedures were not followed in making decision to retain for longer than 15 days an inmate with a "bad attitude", and it is difficult to see how they could have

---

[44]Arkansas Department of Corrections, Disciplinary Procedures, p. 14.

[45]1975 Transcript, Volume 23, , p. 47.

[46]The District Court was not asked to consider and did not decide whether the use of indefinite administrative segregation for this purpose is constitutional. Although that question is thus not before this Court, respondents believe that that practice is also unlawful.

been in light of the vagueness of that standard.[47] Unlike a civil contempt proceeding, in which the incarcerated individual can obtain his release by agreeing to perform some clearly specified act, an inmate in punitive isolation may well have no idea what he must do to win his release. Punitive sanctions have traditionally been imposed in Anglo-American jurisdictions only for a specific prohibited action; the imposition of such a sanction for a "bad attitude" bears a great resemblance to the crime of status condemned in *Robinson v. California*, 370 U.S. 660 (1962). In the instant case, however, the general validity of this practice need not be decided, since the district court's decision imposing a 30 day limit on punitive isolation has the effect of precluding the use of punitive isolation for this purpose.

D. The issue thus presented by the 30 day limitation is whether the District Court exceeded its authority in including that provision in its order remedying the clear and undisputed constitutional violation. In fashioning a remedy for a constitutional violation "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken v. Bradley*, 53 L.Ed.2d 745, 756 (1977). The District Court enjoyed considerable discretion in fashioning a workable and effective remedy so long as the means chosen was related to the constitutional violation, was designed to restore the

[47]For an example of the potential for abuse inherent in a policy of using indefinite sanctions to make a prisoner "subservient and break him down", see *Wright v. McMann*, 321 F. Supp. 127 (N.D. N.Y. 1970), *aff'd* 460 F.2d 126 (2d Cir. 1972), *cert. denied* 409 U.S. 885 (1972).

victims to the position they would have occupied in the absence of the violation, and did not unnecessarily interfere with legitimate prerogatives of state or local authorities. *Id.* at 755-756. Those requirements were clearly met in the instant case.

A violation of the constitutional prohibition against cruel and unusual conditions of incarceration is often a function of both the conditions of incarceration and the length of time the inmate is subjected to them. See 410 F. Supp. at 275. Denial of a bed, nutritious food, medical care, bathing facilities and/or exercise for several hours would not ordinarily raise constitutional problems, but such a denial for a period of weeks would amount to an impermissible "wanton and unnecessary infliction of pain". *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). While other deprivations might be lawful for even a period of weeks, "[i]n some instances, depending upon the conditions of the segregation, and the mental and physical health of the inmate, five days or even one day might prove to be constitutionally intolerable". *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971). See also, *LaReau v. MacDougal*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. den.* 414 U.S. 878 (1973). Where, as here, the conditions and period of incarceration combine to create a constitutional violation, a district court may seek directly to remedy that violation by ordering an amelioration of the intolerable conditions, a shortening of the period during which they may be endured, or both. In the instant case the district court acted reasonably in choosing the latter course.[48]

[48]A similar remedy was employed in *Gates v. Collier*, 501 F.2d 1291, 1305 (1974).

The 30 day limitation served as well to remedy for all inmates, however long their sentence to punitive segregation, the unconstitutional egregious overcrowding. The total population in the punitive wing at Cummins on any given day is a function of the number of inmates recently ordered into punitive segregation and of the length of each sentence. For example, if on the average, ten inmates a day are remanded for a period of 5 days, the average population in punitive will be 50; but if only one out of ten of these inmates is kept for 60 days rather than 5, the average population in punitive isolation would be 105. For this reason the District Court properly concluded that the 30 day limitation would greatly help to "take care of the problem of overcrowding" 410 F. Supp. at 278.[49]

Many of the abuses which contributed to the unconstitutionality of the punitive conditions were practices which it was particularly difficult for the District Court to detect or directly change; the 30 day limitation diminished the impact of these abuses in a manner more effective and less intrusive on the activities of the petitioners than an attempt by the district court to prescribe in great detail every operation of the punitive wing. The District Court's previous general injunctions against brutality and discrimination had not been fully complied with. Some portions of the 1976 order, forbidding certain practices for the first time, could not have been meaningfully monitored and

[49]In the hypothetical case described in the text application of the 30 day limitation would reduce the average population in punitive confinement from 105 to 75.

enforced without a substantial ongoing federal effort.[50] The District Court also noted a number of practices, such as the training and deployment of guards, which contributed substantially to the unconstitutional conditions, but which it was understandably reluctant to directly interfere with. The District Court could have issued detailed orders regarding these and other practices of which inmates had complained, enforcing those orders through reporting requirements, grievance machinery, or other means.[51] The District Court was free to choose, as it did, to reduce the unwarranted suffering caused by these practices by the simple expedient of reducing the amount of time any inmate could spend in the punitive wing where the resulting conditions prevailed. That choice was particularly appropriate in view of the difficulty which the District Court had already experienced in learning from the petitioners what they and their subordinates were doing in the institutions that were the subject of the litigation. See 410 F. Supp. at 275, 281.

Through the seven years of litigation prior to the 1976 decree the District Court, ever hopeful that the petitioners would take voluntary corrective action if the court brought the facts and laws to their attention,

[50]One of the more serious problems of which the inmates complained was that at least one guard gave inadequate portions of food to inmates he disliked by shaking the serving spoon. The problems of enforcing a ban on this practice are obvious. See 410 F. Supp. at 276, n. 11.

[51]See *Newman v. Alabama*, 559 F.2d 283, 290 (5th Cir. 1977) (authorizes appointment of a Federal monitor for each of the state prisons).

exhibited great reluctance to directly order the petitioners to conform their conduct to the constitutional requirements. That optimism, regrettably, proved unjustified; the hearing in 1975 revealed that the constitutional violations noted in earlier opinions, particularly overcrowding, continued. After waiting in vain for literally years for the petitioners to implement a plan of their own to deal with these conditions, the District Judge had no choice but to frame a remedy himself. That remedy, to a substantial degree, merely bound the petitioners to observe standards which they had established but not adhered to. The cells at the Cummins punitive wing were generally designed for one inmate each and had only two beds. 410 F. Supp. at 257. Defendants' written procedures forbade the use of indefinite punitive segregation and, provided, in light of the harsh conditions involved, that no inmate should ordinarily be kept there for more than 15 days. The District Court's Order, including establishing a 30 day maximum, assisted petitioners to bring their practices into conformity with their own principles, was the least intrusive injunctive order that would have remedied the constitutional violations, and was long overdue.

II.

THE DISTRICT COURT HAD THE AUTHORITY TO AWARD COUNSEL FEES AGAINST THE DEPARTMENT OF CORRECTION

The District Court awarded counsel fees because the petitioners had acted in bad faith. 410 F.Supp. at

281-285. The Court of Appeals held that such an award was also authorized by the Civil Rights Attorney's Fees Awards Act of 1976. 548 F.2d at 742. Each of these grounds provides an independent basis for sustaining the award.

A. Counsel Fees May Be Awarded Against State Officials Or Agencies Which Have Acted In Bad Faith

In *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), this Court reiterated the long standing rule that a court may assess counsel fees in a case in which the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." 421 U.S. at 259.[52] This rule has been applied to a variety of forms of conduct, including an intentional violation of the plaintiff's constitutional or statutory rights,[53] an inexcusable default on an

---

[52]See also *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *F.D. Rich v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, n.5 (1968).

[53]The seminal case is *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951), cited with approval in *Rich*, 40 L.Ed.2 at 714, n.17, *Hall*, 412 U.S. at 5, and *Vaughn v. Atkinson*, 369 U.S. 527, 530 (1962). See also *Bell v. School Bd. of Powhatan County*, 321 F.2d 494 (4th Cir. 1963), cited with approval in *Rich* and *Hall*; *Richardson v. Communications Workers of America*, 530 F.2d 126, 132 (8th Cir. 1976); *Doe v. Poelker*, 515 F.2d 541, 547 (8th Cir., 1975).

obligation to remedy a past or existing violation,[54] an unjustifiable defense of clearly unlawful conduct,[55] or dilatory, fraudulent, or otherwise improper litigation tactics.[56] Each of these forms of bad faith unfairly burdens not only the adverse party but also the federal courts. Cf. *Illinois v. Allen*, 397 U.S. 337, 347 (1970).

In the instant case the District Court made a factual finding that the petitioners "have acted in bad faith and oppressively and that the case falls within the 'bad faith' exception to the *Alyeska* rule." 410 F.Supp. at 284. The District Court based this finding on several distinct grounds: (1) petitioners had operated "a patently unconstitutional prison system" prior to the commencement of this action (2) the petitioners had shown persistent and increasing unwillingness to remedy intolerable conditions unless ordered to do so by the court, (3) although the plaintiffs repeatedly brought to light through discovery patterns of misconduct so egregious that petitioners recognized they had to be corrected, petitioners inexplicably failed to make inquiries of their own into what was occurring in the prisons for which they were responsible,[57] (4) despite a series of hearings and written and oral orders from the

[54] *Bradley v. Richmond School Board*, 416 U.S. 696, 707, n.10 (1974); *Vaughn v. Atkinson*, 369 U.S. at 530-31; *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971), cited with approval in *Rich, Sims v. Amos*, 340 F.Supp. 691, 694 (N.D. Ala. 1972), aff'd 409 U.S. 942.

[55] *Newman v. Piggie Park Enterprises, supra; Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974).

[56] *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).

[57] Compare *Matter of Yamashita*, 327 U.S. 1, 14-16 (1945).

court over the course of the litigation, constitutional violations continued. 410 F.Supp. at 284-285. In view of the District Judge's unique familiarity with the conduct and attitude of the petitioners garnered over 7 years from numerous hearings, his finding of bad faith is entitled to particularly great weight.

The Court of Appeals although relying primarily on the Civil Rights Attorney's Fees Awards Act, concluded that "the record fully supports the finding of the District Court that the conduct of the state officials justified the award under the bad faith exception enumerated in *Alyeska Pipeline Service Co. v. Wilderness Society.*" 548 F.2d at 742, n. 6. Such a concurrent finding of fact by two courts below is not subject to review in this Court in the absence of extraordinary circumstances not present here. *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); see *Runyon v. McCrary*, 427 U.S. 160, 184 (1976). The correctness of this finding does not appear to be questioned by petitioners.

The order of the district court provides

> The court now awards counsel for petitioners the sum of $20,000.00 as an attorneys' fee on account of services performed by them in this litigation since the remand resulting from *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974). The court also directs that counsel be reimbursed for the reasonable and necessary expenses paid or incurred by them, including the expenses of employing law students to assist in the preparation of the case, since the remand, but not to exceed $2,000.00. Counsel should be able to agree on the amount of the expenses; if not, they

> can take up the matter with the court. These awards are to be paid out of Department of Correction funds.

Counsel for petitioners here objects to the last sentence of this decree, directing that the fees and costs be paid out of the funds of the Department of Corrections which are under the control of the petitioners. If this objection is sustained the rest of the order will stand, and the award will still have to be paid by Mr. Hutto and the other petitioners, presumably out of their personal resources.[58] Counsel for petitioners asserts that, although petitioners may be directed to pay the awarded sum, they may not be directed to do so out of Department funds.

The question of whether counsel fees are among the remedies ordinarily precluded by the Eleventh Amendment has been before the Court on three previous occasions. In *Sims v. Amos*, 340 F.Supp. 691, 695 (N.D. Ala. 1972), counsel fees were awarded against elected Alabama state officials in their official capacity. The state attorney general appealed, claiming such an award was tantamount to the award of a money judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity, but this Court unanimously affirmed the award without opinion. 409 U.S. 942.[59] In *Alyeska Pipeline Service*

[58]Unlike the situation in *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), the payment of the award out of petitioners' personal funds is both possible, in light of the amount involved, and entirely justifiable, since the bad faith relates to the personal conduct of Mr. Hutto and his predecessors.

[59]This issue was discussed as well at the oral argument in *Edelman v. Jordan*, 415 U.S. 651 (1974), but was not mentioned in the opinions.

Co. v. The Wilderness Society, 421 U.S. 240 (1975), the majority, while finding no occasion to discuss the Eleventh Amendment issue 421 U.S. at 269, n. 44, noted that the award upheld in *Sims* rested in part, as here, on the bad faith of the defendants. 421 U.S. at 270, n. 46. In *Bitzer v. Matthews*, No. 75-283, decided *sub. nom. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the majority again did not reach the issue, 427 U.S. at 457, but Mr. Justice Stevens concurred on the ground that counsel fees, like other litigation costs, were not subject to the Eleventh Amendment. 427 U.S. at 460. Certiorari was granted to decide this issue in *Stanton v. Bond*, No. 75-1413, but the case was subsequently remanded for consideration of the Civil Rights Attorneys' Fees Act of 1976. 50 L.Ed.2d 581 (1976). The courts of appeals are divided on this question.[60]

As initially adopted section 2 of Article III provides in part that "[t]he judicial Power shall extend to all cases, in Law and Equity, arising . . . between a State

[60]Three circuits have held such awards permissible. *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Jordan v. Fusari*, 496 F.2d 646 (2d Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). Two circuits have concluded that the Eleventh Amendment applied to such awards. *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Taylor v. Perini*, 501 F.2d 899 (6th Cir. 1974); *Skehan v. Board of Trustees*, 503 F.2d 31 (3d Cir. 1974). Two circuits are divided. *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975) (awards permissible); *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 519 F.2d 1315 (4th Cir. 1975) (awards prohibited); *Milburn v. Huecker*, 500 F.2d 1279 (5th Cir. 1974) (awards permissible); *Named Individual Member v. Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974).

and Citizens of another state . . . and between a State . . . and foreign . . . Citizens or Subjects." In 1798, in the wake *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1798), the Eleventh Amendment was adopted to repeal this language. Unchanged since then, the Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extent to any suit in law or equity, commenced or prosecuted against one of the United States by Citizen of another State or by Citizens or Subjects of any Foreign State.

Although the amendment, read literally, merely deletes the quoted language from Article III, it has been construed by this Court also to limit the judicial power under other clauses of Article III. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court extended the Eleventh Amendment immunity to suits against a state by its own citizens.[61] In *Hagood v. Southern*, 117 U.S. 52 (1886), the Court held that the Eleventh Amendment could be asserted to preclude relief against an individual defendant where the "real" defendant affected by the order was a State. 117 U.S. at 67. See also *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). It is this latter doctrine with which this case is concerned.

[61]In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 309-15 (1973) Justice Brennan, dissenting, expressed the view that *Hans* was wrongly decided, and that the Eleventh Amendment should not be applied to suits against state by its own citizens. Although we believe that Justice Brennan's analysis was correct, that issue need not be reopened in order to resolve this case.

The fact that an order against a state official directs the official to use or disburse state funds within his or her control does not, by itself, bring the order within the prohibition of the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment did not preclude the federal courts from directing state officials to conform their conduct to the requirement of the Fourteenth Amendment. In [illegible]*m v. Richardson*, 403 U.S. 365 (1971) and *Gol[illegible] v. Kelly*, 397 U.S. 254 (1970), this Court upheld orders directed to state welfare officials which clearly had substantial fiscal consequences for the state treasuries involved.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court explained that the validity of an order affecting the use of state funds turned on whether the order was "in practical effect indistinguishable . . . from an award of damages against the State," 415 U.S. at 668, or was merely "ancillary" to an order directing state officials to conform their present and future conduct to the requirement of the federal Constitution and laws. In *Edelman* this rule was applied to preclude the retrospective award of welfare payments which had been unlawfully delayed or withheld; the Court emphasized that such an award, however labeled, was indistinguishable from damages since "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668. Three years later in *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977), this Court sustained an order directing Michigan officials to pay over $5 million in state funds to the Detroit School Board for the operation of certain programs established to remedy

past racial discrimination. The order was deemed ancillary to and a necessary concomitant of the district court injunction establishing those remedial programs.

Although "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman v. Jordan*, 415 U.S. at 667, the application of that distinction in this case is largely resolved by this Court's decision in *Fairmont Creamery v. State of Minnesota*, 275 U.S. 70 (1927). In that case, arising out of a state court prosecution of the Fairmont Creamery Company, this Court overturned the Company's conviction and awarded it costs. Subsequently the state filed a motion to retax costs on the ground that such a monetary award violated the sovereignty and immunity of the state. This Court unanimously upheld its power to make such awards of costs against a state as "within the inherent authority of the court in the orderly administration of justice as between all parties litigant." 275 U.S. at 74. The Court noted that the exercise of this authority was particularly appropriate and important where costs were awarded because the action was "a 'litigious case,' so-called," i.e. because the defendant had been unduly intransigent. *Id.*

As this Court noted in *Fairmont Creamery*, 275 U.S. at 77, the federal courts have traditionally awarded costs against a state, directly or through its officials, when the state becomes involved in litigation in a federal court in its own name or on behalf of its officials. Since the Judiciary Act of 1789[62] the federal

[62]1 Stat. 73, 93; *Henkel v. Chicago, etc., R.R.*, 284 U.S. 444 (1932).

courts have been expressly empowered to award costs. Provisions authorizing, and at times requiring, the award of costs and expenses are to be found throughout the Federal Rules of Civil Procedure,[63] the Federal Rules of Criminal Procedure,[64] the Federal Rules of Appellate Procedure,[65] the Rules of the Supreme Court,[66] and the United States Code.[67] These rules and statutes are literally applicable to all federal litigation, regardless of the identity of the parties, and have been uniformly applied even where the party liable for costs is a state or a state official. The Clerk of this Court taxes costs against a losing party without regard to the official status of that party. Costs are routinely awarded by this Court against (a) state agencies which are the defendants in federal civil actions for injunctive relief, (b) state officials who are the defendants in federal civil actions for injunctive relief, (c) state officials who are the defendants in federal habeas corpus actions, (d) state agencies which are the defendants in civil actions originating in state court, and (e) states in criminal prosecutions originating in state courts. A list of the cases in which such awards were made in October Terms 1970-76 is set out in the Appendix to this brief.

[63]Federal Rules of Civil Procedure, Rules 30(g), 37(a)(4), 41(d), 43(f), 54, 55(b)(1), 56(g), 65(c), 68.

[64]Federal Rules of Criminal Procedure, Rule 38(a)(3).

[65]Federal Rules of Appellate Procedure, Rules 7, 38, 39.

[66]Rules of the Supreme Court, Rules 14, 18, 36(3), 57, 60.

[67]See e.g., 28 U.S.C. §§1331, 1332, 1446, 1911-29, 2101(f), 2103.

That awards of costs are not subject to the Eleventh Amendment is consistent with the analysis in *Edelman*. The amount of costs, unlike damages, are not measured by the forseeable amount of harm caused by the defendant's violation of its legal responsibilities. Costs are only ancillary to any relief which may be prayed for in a complaint, and are not considered in assessing whether a case presents the $10,000 in controversy required by 28 U.S.C. §1331. If an action were won by default, or settlement, immediately after filing, there would be virtually no costs incurred. The ultimate award of costs in an injunctive action is, like the expenses incurred by the state's own counsel, an ancillary fiscal aspect of the conduct of litigation for prospective relief.

Petitioners in this case do not appear to deny that, as a general matter, the federal courts may award costs against states and state officials. Such awards are the normal incident of a successful action for declaratory or injunctive relief, and their "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Were this Court to held such awards impermissible under the Eleventh Amendment, it would be required to rule unconstitutional insofar as they apply to state officials, every federal court rule and every provision of the United States Code authorizing awards of costs.

Petitioners maintain, however, that counsel fees cannot be included among the awardable costs, and that such fees are really a form of damages. We note at the outset that if petitioners' contention is sustained, then the award of counsel fees in this case must be paid by

Arkansas as a matter of state law. Arkansas Act 543 of 1977, which became law on March 18, 1977 provides in pertinent part that the State "shall pay actual damages adjudged by a state or federal court . . . against officers or employees of the State of Arkansas . . . based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties." Whatever the decision of this Court, the result in this case will remain the same. If the Court concludes counsel fees are awardable as costs, it will sustain the District Court order directing the fee be paid from state funds; if the Court concludes that counsel fees are "really" damages, it may overturn the requirement that the fee be paid from state funds, but the state will then pay it voluntarily in place of Mr. Hutto pursuant to Act 543.

There is, we believe, no basis for distinguishing counsel fees from other items of costs, such as transcripts, printing expenses, filing or docketing fees, or the expenses of witnesses, experts or interpreters. Awards of counsel fees, where proper, have long been regarded as a part of costs. The earliest authority for such awards in England was contained in a statute adopted in 1278 providing for taxation of "costs of his writ purchased."[68] The first congressional enactments regulating the award of counsel fees treated them as an item of taxable costs. 1 Stat. 93, 332; 10 Stat. 161 (1853); see 28 U.S.C. §1923(a). In recent years

---

[68]Statute of Gloucester, 1278, 6 Edw. 1, c. 1; *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, n. 7 (1967).

Congress has adopted more than a score of statutes authorizing awards of attorneys' fees; in virtually every case that award was made an item to be included as part of the taxable costs.[69] In England costs have

[69]See e.g., 5 U.S.C. §552(a)2E (court may assess "attorneys' fees and other litigation costs"); 7 U.S.C. §210(f) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); 7 U.S.C. §499g(b) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit"); 15 U.S.C. §15 (plaintiff in antitrust action to recover "the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. §72 (person injured by illegal importation to recover "the cost of the suit including a reasonable attorney's fee"); 15 U.S.C. §77k(e) (court may award to prevailing party "the costs of such suit, including reasonable attorney's fee"); 15 U.S.C. §78i(e) (court in securities case may "assess reasonable costs, including reasonable attorneys' fees"); 15 U.S.C. §78r(a) (court may "assess reasonable costs including reasonable attorneys' fees"); 17 U.S.C. §116 (court in patent action may award "a reasonable attorney's fee as part of the costs"); 18 U.S.C. §1964(c) (person injured by racketeering may sue and recover "the cost of the suit, including a reasonable attorney's fee"); 20 U.S.C. §1617 (court in school desegregation case may allow "a reasonable attorney's fee as part of the costs"); 33 U.S.C. §1365(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 33 U.S.C. §141(g)(4) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. §1857h-2(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. §2000a-3(b) (court in public accommodations case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. §2000e-5(k) (court in employment discrimination case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. §4911(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 45 U.S.C. §153(p), (court in Railway Labor Act case must allow prevailing

(continued)

traditionally included counsel fees; American practice diverged from this rule in early 19th century when Congress and the state legislatures adopted statutes severely limiting the amount of fees ordinarily includable as part of costs.[70] Since 28 U.S.C. §1923 authorizes but so limits in amount the award of counsel fees *as costs*, this Court in Alyeska Pipeline *Service v. Wilderness Society*, 421 U.S. 240 (1975), concluded the statute precluded an open ended power to award fees as a matter of equitable discretion. In *Flanders v. Tweed*, 15 Wall (82 U.S.) 450 (1873), the Court held that a jury could not award an fee in excess of that permitted by §1983 by denoting the additional counsel fees as damages rather than costs. 15 Wall at 452-53. See also, *Trustees v. Greenough*, 105 U.S. 527 (1882).

(footnote continued from preceding page)
employees "a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 46 U.S.C. §1227 (successful plaintiff to recover "the cost of suit, including a reasonable attorney's fee"); 47 U.S.C. §206 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case"); 49 U.S.C. §8 (court to award "reasonable counsel or attorney's fees" which "shall be taxed and collected as part of the costs of the case"); 49 U.S.C. §16(2) (court to award "reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 49 U.S.C. §908(b) (court to award "a reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case").

[70]Mr. Cormick on Damages, §60 (1935); Goodhart, Costs, 38 Yale Law Journal 849, 873 (1929). Professor Goodhart suggests the statutory allowances for fees may have been a reasonable approximation of actual fees when these statutes were first enacted, but were rendered nominal by the decades of inflation which followed. *Id.*

Counsel fees differ from other items of costs only in that, because of the American Rule, 28 U.S.C. §1923, and the variety of statutes noted at n.69, whether counsel fees can be taxed varies considerably from case to case, whereas docketing fees and transcripts are ordinarily taxable costs in all cases. The characteristics of other items of costs which render them ancillary under the standard of *Edelman* are also true of counsel fees. The amount of those fees are not measured by some past injury, they are not the gravamen of the action, and they will not, to a significant degree, be incurred or awardable if the action is resolved immediately after it is commenced. Frequently the fiscal impact of a counsel fee award will be minor in comparison with that of the injunctive relief which is the primary focus of the action. In the instant case, for example, the litigation resulted in the construction of a $546,000 building at Cummins, the cost of which was 27 times greater than the fee awarded. In light of these considerations the District Court correctly concluded that the Eleventh Amendment does not affect awards of counsel fees.

Respondents further maintain that the adoption of the Fourteenth Amendment worked a *pro tanto* repeal of the Eleventh Amendment, and that the Eleventh Amendment thus has no application in a Fourteenth Amendment case such as this. This Court noted the existence of this question but did not decide it in *Milliken v. Bradley*, 53 L.Ed.2d 745, 762, n.23 (1977); see also *Edelman v. Jordan*, 415 U.S. 651, 694, n.2 (1974) (Marshall, J., dissenting). Respondents concur in the views as to the impact of the Fourteenth Amendment are set out in the Brief Amicus Curiae of

the N.A.A.C.P. Legal Defense and Educational Fund, Inc. in *Edelman v. Jordan*, No. 72-1410. If the Court concludes that the Eleventh Amendment does not apply to awards of counsel fees it will not be necessary to decide to what extent that Amendment was modified by the subsequent enactment of the Fourteenth Amendment.

B. The Civil Rights Attorney's Fees Awards Act of 1976 Authorized Awards of Counsel Fees Against States In Actions Under 42 U.S.C. §1983

The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-449, now codified in 42 U.S.C. §1988, was enacted in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Prior to *Alyeska* a number of lower courts had concluded that counsel fees could be awarded to prevailing plaintiffs who, acting as "private attorneys general", had vindicated important public policies; this private attorney general rule was applied with particular frequency in civil rights cases. 421 U.S. at 270, n.46. In *Alyeska* the Court held that the decision to award counsel fees under this rationale was "a policy matter that Congress has reserved for itself". Noting that "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees in some, but not others", 421 U.S. at 264, the majority held that counsel fees should only be allowed to private attorneys general under statutes which Congress had selected for such awards. In *Runyon v. McCrary*, 427 U.S. 160 (1976)

decided prior to the passage of P.L. 94-449 the Court ruled that 42 U.S.C. §1988 as then written did not provide such congressional authorization for awards of counsel fees in actions brought under 42 U.S.C. §1983. 427 U.S. at 182-86.

Within a few months of *Alyeska* numerous proposals was introduced in Congress to provide for civil rights cases the express congressional mandate for awards of counsel fees required by that decision.[71] Acting with unusual dispatch Congress completed hearings within that year,[72] The Senate and the Senate and House Judiciary Committees reported out similar bills in June and September of 1976.[73] Both reports emphasized that the basic purpose of the legislation was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court decision in *Alyeska*"[74] and to revive the practice sanctioned by numerous lower courts, but disapproved by footnote 46 of the *Alyeska* opinion, of awarding fees to private attorneys general in civil rights cases.[75] After debates emphasizing

[71]H.R. 7826, 7828, 7968, 7969, 8220, 8221, 8821, 8742, 8743, 9552, 94th Cong., 1st Sess.

[72]Hearings on the Awarding of Attorneys' Fees Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 94th Cong., 1st Sess. (1975). The Senate which had held extensive hearings on the problem of counsel fees prior to *Alyeska*, did not hold additional hearings. Hearings on Legal Fees Before one Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee, 93rd Cong., 1st Sess. (1973).

[73]S. Rep. No. 94-1011; H.R. Rep. No. 94-1558.

[74]S. Rep. No. 94-1011, p. 1.

[75]H.R. Rep. No. 94-1558, p. 2.

Congress' intent to supply the express authorization of fees required by *Alyeska*, the Senate ended a filibuster, both houses approved the bill, and it was signed into law on October 19, 1976.[76]

[76]Representative Drinan, the House sponsor, explained:

> "The Civil Rights Attorney's Fees Award Act of 1976, S. 2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in cases initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975)."

122 Cong. Rec. H12159 (daily ed. October 1, 1976); see also *id*, pp. H12150 (remarks of Rep. Anderson), H12154 (remarks of Rep. Railsback), H12155 (remarks of Rep. Seiberling), H12181 (remarks of Rep. Railsback), H12162-63 (remarks of Rep. Kastenmeier), H12163 (remarks of Rep. Fish), H12164 (remarks of Rep. Holtzman), (remarks of Rep. Seiberling). Senator Kennedy, the Senate manager of the bill, stated:

> "[t]he Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights Acts. This bill would close a series of loopholes in our civil rights laws created by the Supreme Court's Alyeska decision last year, and would reestablish a uniformity in the remedies available under Federal laws guaranteeing civil and constitutional rights."

122 Cong. Rec. S.16252 (daily ed., September 21, 1976). Senator Tunney, the Senate sponsor, noted that the bill

> "When enacted, will close a loophole in our present civil rights enforcement laws.
>
> In *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court expressly stated that the lower Federal courts had no inherent equity power to award attorney's fees in civil rights cases absent statutory direction. This bill creates the necessary authorization and is addressed to the key questions raised in the opinion."

122 Cong. Rec. S.16491 (daily ed., September 23, 1976); see also *id.* at 51651 (remarks of Senator Mathias) (daily ed., September 21, 1976), S.16431 (remarks of Senator Hathaway (daily ed., September 23, 1976).

Public Law 94-559 provides:

> "In any action of proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§1681, et seq.] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or changing a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§ et seq.], or Title VI of the Civil Rights Act of 1964 [42 U.S.C. §§2000d et seq.], the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The statute expressly modifies the remedies available in a §1983 action, thus providing the congressional authorization for private attorney general awards required by *Alyeska* and found missing by *Runyon*.

While authorizing an award of counsel fees in favor of "the prevailing party," Public Law 94-559 does not specify against whom this or other awards of costs are to be made. Ordinarily costs, like other relief, are awarded against the named defendant in a civil action. In addition, a non-party who has an interest in the outcome of litigation and who fully participates therein is normally deemed liable to judgment just as if it were a formal party. "(O)ne who prosecutes or defends a suit in the name of another, to establish and protect his own rights, or who assists in the prosectuion or defense of an action in aid of some interest of his own, and who does so openly, to the knowledge of the opposing party, is as much bound by judgment, . . . as he would be if he had been a party to the record." *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87

(1910).[77] A state or other entity may elect to stand aloof from litigation against an official and to thus seek to preserve intact any immunity it may enjoy, but if it chooses to join in the litigation and to seek to win and enjoy the benefits of a successful defense, it must run the same risks, including the possibility of an award of costs, that must be run by an ordinary party should that defense fail. Compare 2A Moore's Federal Practice ¶12.13.

The rule in *Souffront* is of obvious importance in litigation under 42 U.S.C. §1983. Such actions must usually be brought against a city or state official rather than against the city or state itself. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961).[78] In most of these cases the city or state

---

[77]*Grimes. v. Chrysler Motors Corp.*, ____ F.2d ____ (2d Cir. 1977); *Dicks Press Guard Mfg. Co. v. Bowen*, 229 F. 193, 196 (N.D. N.Y.), aff'd, 229 F. 575 (2d Cir.) *cert. denied*, 241 U.S. 671 (1915); *Ocean Accident & Guarantee Corp. v. Felgemaker*, 143 F.2d 950, 952 (6th Cir. 1944); *Eagle Mfg. Co. v. Miller*, 41 F. 351, 357 (S.D. Iowa 1890); *Maynard v. Wooley*, ____ F. Supp. ____ (D.N. H. 1977).

[78]To what extent city or state agencies are immune from suits remains an open question, as does the extent to which, notwithstanding *Kenosha* and *Monroe*, a defendant official in a section 1983 action can be directed to expend government funds. See *Monnell v. Department of Social Services*, No. 75-1914; *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977). The instant proceeding resulted from a consolidation of a substantial number of prisoner suits filed in the District of Arkansas from 1969 to 1972. In two of these actions the Arkansas Department of Corrections was a named defendant. *Pittman v. Arkansas Department of Corrections*, PB-72-C-15, *Russell v. Department of Corrections*, PB-72-C-155.

assumes control of the defense of the litigation, either to vindicate the validity of the challenged practice or to protect the defendant officials from monetary awards. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). When that occurs it is the city or state, rather than the individual defendants, whose unsuccessful defense of the action requires the plaintiff to incur attorneys' fees and costs. In the instant case the Attorney General of Arkansas assumed control of the litigation from the outset and conducted the lengthy and at times intransigent defense.[79] Under such circumstances, as here, any award of costs would properly be made payable by the city or state rather than named defendants. Public Law 94-559 includes counsel fees among the costs which may be awarded against the named defendant or interceding interested government, as justice may require.

The legislative history of Public Law 94-559 unambiguously demonstrates that Congress intended that the statute be applied in this manner, and that awards in cases such as this be paid out of state funds. The Senate Report stated:

> "As with cases brought under 20 U.S.C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies

[79] 2A Ark. Stat. Anno. §12-712 provides:

> "The Attorney General shall maintain and defend the interests of the State in matters before the United States Supreme Court, and all other Federal courts, and shall be the legal representative of all State officers, boards and commissioners, in all litigation where the interests of the State are involved."

> or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

See Rep. No. 94-1011, p. 5. Similarly the House Report noted that:

> "governmental officials are frequently the defendants in cases brought under the statutes covered by [the bill]. See, *e.g.*, *Brown v. Board of Education* . . . Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities.

H.R. Rep. No. 943-1558, p. 7.

In the Senate, Senator Helms offered an amendment to the bar awards of counsel fees against "any territory or possession thereof, or any State of the United States or any political subdivision thereof including special purpose units of general local governments."[80] Senator Helms urged that the amendment was necessary to "afford protection to financially pressed State and local

[80] 122 Cong. Rec. S. 16433 (daily ed. Sept. 22, 1976).

governments."[81] The Senate rejected the proposal by a vote of 59 to 28.[82]

Congress was aware that the award of counsel fees against states might raise a question under the Eleventh Amendment. The Administrative Office of the United States Courts and two other organizations expressly brought the issue to the attention of the House Judiciary Committee.[83] The House Report, issued two months after the decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), expressly invoked that decision as upholding the power of Congress to subject a state to monetary liability despite the Eleventh Amendment.[84] The Senate Report, written before *Fitzpatrick*[85] as-

[81]*Id.*, at S. 16432, "This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes and that attorneys' fees will be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State of local government. Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments."

[82]*Id.*, S. 16434.

[83]Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, 94th Cong., 1st Sess., pp. 36, 41, 268 (1975).

[84]*Id.*, p. 8, n. 14. "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer.*"

[85]The report was filed on June 29, 1976, the day after the decision in *Fitzpatrick*.

serted that the award of such fees were "in accordance with Congress' powers under, *inter alia*, the Fourteenth Amendment, Section 5," insisted such fees were "ancillary and incident to securing compliance with"[86] sections 1983, etc., noted that counsel fees were properly regarded as "costs", and cited the decision in *Fairmont Creamery* exempting counsel fees from the scope of the Eleventh Amendment.[87] In the House debates Congressman Drinan, the bill's sponsor, reiterated Congress' authority to impose liability on a state notwithstanding the Eleventh Amendment.[88]

Awards of fees from government funds are manifestly necessary to carry out the fundamental purposes of the statute. As the House Report explained:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many

[86]This was clearly an attempt to invoke the standard announced by the Court in *Edelman v. Jordan*, discussed *supra*.

[87]S. Rep. No. 94-1011, p. 5.

[88]"The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th Amendment. That amendment limits the power of the Federal court to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick and Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." 121 Cong. Rec. H12160-61 (daily ed., October 1, 1976).

> instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolves according to law.

H.R. Rep. No. 94-1558, p. 1.[89] In any §1983 case involving protracted litigation the amount of the fee to which a prevailing plaintiff would be entitled could easily exceed the personal funds of the individual defendants. If the resources of the city or state conducting the litigation could not be reached the plaintiff could not receive the full redress contemplated by Congress. Where, as commonly occurs, the actual conduct of the litigation is controlled by the city or state, immunity from an award of fees would encourage government counsel to act in a dilatory manner unfair to plaintiff and defendant alike. Under other counsel

[89]See also S. Rep. No. 94-1011, pp. 2, 6; 122 Cong. Rec. S16251 (remarks of Senators Scott and Mathias), S16242 (remarks of Senator Kennedy) (daily ed. September 21, 1976). S1643 (remarks of Senator Hathaway) (daily ed. September 23, 1976), S17051 (remarks of Senators Kennedy and Tunney), S17052 (remarks of Senators Kennedy and Abourezk) (daily ed. September 29, 1976); H12155 (remarks of Rep. Sieberling), H12163 (remarks of Rep. Fish), H12164 (remarks of Rep. Holtzman) (daily ed. October 1, 1976).

fee provisions, such as the Civil Rights Act of 1964[90] the Emergency School Aid Act of 1972,[91] awards against cities and states are clearly authorized.[92] The legislative history of Public Law 94-559 makes plain that Congress intended that that statute "would achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights,"[93] and specifically referred to Civil Rights[94] and Emergency School Aid Acts[95] as establishing the standards it wished to apply to litigation under 42 U.S.C. §1983. The intended uniformity clearly requires that counsel fees be available against cities and states in §1983 cases just as it is in Title VII and school desegregation cases.

The power of Congress to impose monetary liability on a state in connection with a violation of the

[90]See, e.g., 42 U.S.C. §2000e-5.

[91]20 U.S.C. §1617.

[92]*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1977); *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974).

[93]H.R. Rep. No. 94-1558, p. 1; see also *id.*, p. 8; S. Rep. No. 94-1011, pp. 1, 4; 122 Cong. Rec. S16252 (remarks of Senator Kennedy) (daily ed. September 21, 1976); H12151 (remarks of Rep. Anderson), H12159 (remarks of Rep. Drinan), H12163 (remarks of Rep. Kastenmeier) (daily ed. October 1, 1976).

[94]S. Rep. No. 94-1011, pp. 4, 5; H.R. Rep. No. 94-1558, p. 6; 122 Cong. Rec. S16251 (remarks of Senator Scott) (daily ed. September 21, 1976), S16430-31 (remarks of Senator Hathaway) (daily ed. September 23, 1976), H12150 (remarks of Rep. Anderson), H12159 (remarks of Rep. Drinan), H12163 (remarks of Rep. Kastenmeier), H12165 (remarks of Rep. Seiberling) (daily ed. October 1, 1976).

[95]S. Rep. No. 94-1011; p. 4; H.R. Rep. No. 94-1558, pp. 1, 3, 6.

Fourteenth Amendment is not disputed. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court rejected a challenge to the power of Congress to subject states to awards of backpay and counsel fees under Title VII of the 1964 Civil Rights Act. The Court concluded that "[w]hen Congress acts pursuant to §5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456. Provisions for awards of counsel fees in Fourteenth Amendment litigation to redress cruel and unusual[96] prison conditions is clearly an appropriate method of vindicating that constitutional prohibition. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Although the intent and authority of Congress is beyond dispute, petitioners maintain that the Congress failed to frame the statute in a manner sufficient to achieve its purpose. Were this contention accepted, it would not only frustrate the congressional purpose, but would render counsel fee awards in section 1983 cases, which are awarded without regard to the defendants'

[96]The Eighth Amendment prohibition against cruel and unusual punishment is incorporated in the due process clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

good faith, payable exclusively from the personal resources of the defendant official. That individual liability would exist even though the official had no meaningful control of the litigation, and would apply regardless of whether the defendant official were a governor,[97] legislator,[98] judge,[99] police officer,[100] school official,[101] or prosecutor.[102] In the instant case petitioners' argument, if successful would shift the liability for the counsel fee from the funds of the Board of Corrections to the personal funds of Mr. Hutto.

Petitioners appear to urge that where Congress wishes to exercise its authority under section 5 of the Fourteenth Amendment to impose liability on a state it must do so in some special "express statutory language."[103] Precisely what language petitioners claim must be used is not clear. The decisions of this Court support no such technical requirement. In *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), the "literal language" of the statute rendered state agencies liable to suit in federal court. 411 U.S. at 283. The Court nonetheless concluded there was no such jurisdiction because it could find "not a word in the history of the 1966 amendments to indicate a

[97]See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

[98]See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

[99]See *Pierson v. Ray*, 386 U.S. 547 (1967).

[100]See *Pierson v. Ray*, 386 U.S. at 555-57.

[101]See Wood v. Strickland, 420 U.S. 308 (1975).

[102]Imbler v. Pachtman, 424 U.S. 409 (1976).

[103]Brief for Petitioners, pp. 7-9.

purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." 411 U.S. at 285. (Emphasis added) Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974) the Court concluded that section 1983 did not authorize monetary awards from state funds, not because of the language of the statute, but because there was no evidence that section 1983 "was *intended* to create a waiver of a State's Eleventh Amendment immunity merely because of action could be brought against state officers, rather than against the State itself." 415 U.S. at 676-77. (Emphasis added) The construction of statutes touching on a State's Eleventh Amendment immunity differs from that of other statutes, if at all, only to the extent that, where the consequence of a loss of immunity would be unusually harsh, the Court will not infer from a silent legislative history an intent to so affect "the delicate federal-state relationship."[104] *Employees*, 411 U.S. at 286. In the instant case that history is unambiguous, and the resulting liability for counsel fees is an ordinary

[104]This is well exemplified by the circumstances of *Employees* and *Fitzpatrick*. In both cases the statute involved merely repealed a prior exclusion of state agencies from an existing regulatory scheme. In *Employees* the legislative history was silent, and federal jurisdiction would have subjected the states to an unusual provision for double damages; the Court declined on the record to infer an intent to create federal jurisdiction. In *Fitzpatrick* coverage by Title VII entailed only liability for injunctive relief, backpay, and counsel fees; the Court in summarily construing the statute to authorize suit in federal court did not bother to discuss the statute's legislative history.

incident of litigation, not the unique provision for double damages at issues in *Employees*.

Petitioners further contend that Public Law 94-559 should not be applied to litigation which was commenced prior to October 19, 1976 though still pending on that date. Brief for Petitioners, pp. 9-11. Assuming *arguendo* that this question is "fairly comprised" within the question presented, we believe it is manifestly unsound. *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), presents a situation indistinguishable from the instant case. There, as here, a new statute expressly authorizing counsel fees was enacted long after the commencement of the action but while the propriety of such an award was still an issue pending before the court of appeals. This Court upheld the award of fees under the newly adopted statute in light of "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. In *Bradley* the legislative history was silent; in the instant case Congress clearly indicated its intent that the statute be applied to pending cases.[105]

[105]H.R. Rep. No. 94-1558, P. 4, n. 6. "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." The House manager, Congressman Drinan, explained "[T]his bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board, the Supreme Court expressly applied that

(continued)

Petitioners suggest that the application of Public Law 94-559 to this case would result in "manifest injustice." Although they contend that an award of $20,000 will have "tremendous" effect on "the budgetary and fiscal policy of the State of Arkansas," this sum is clearly an insignificant portion of the State's annual budget of $1 billion, and is also insignificant in comparison with the funds required to comply with undisputed portions of the injunctive relief. Petitioners do not suggest that they would have acted any differently had they been aware of their possible liability for counsel fees; nor would such a contention be plausible in light of the facts of this case, since the private attorney general rule was applied by the Eighth Circuit prior to *Alyeska*,[106]

(footnote continued from preceding page)
long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute." 122 Cong. Rec. H12160 (daily ed. October 1, 1976); see also *id.*, pp. H12155 (remarks of Rep. Anderson). A motion by Representative Ashbrook to recommit the bill with instructions to amend it to apply "to cases filed only after the effective date of this act" was decisively rejected. *Id.*, p. H12166. Senator Abourezk, one of the chief proponents of the bill, explained, "The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974)."

This application is necessary to fill the gap created by the *Alyeska* decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." 122 Cong. Rec. S17052 (daily ed. September 29, 1976).

[106]Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974);

and the district court had previously made another fee award of $8,000 payable from the funds of the Department. See *Bradley v. Richmond School Board*, 416 U.S. at 720-22. Here, as in *Bradley*, the litigation assisted the defendants in meeting their constitutional responsibilities. 416 U.S. at 717-20. This case presents no exceptional circumstances which would warrant disregarding the plain intent of Congress, and the rule in *Bradley*, that this newly enacted legislation be applied to pending cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Judgment of the courts below should be affirmed.

Respectfully submitted,

PHILIP E. KAPLAN
1650 Tower Building
Little Rock, Arkansas 72201

JACK HOLT, JR.
1100 North University
Evergreen Place
Little Rock, Arkansas

PHILIP E. McMATH
McMath, Leatherman & Woods,
711 West Third Street
Little Rock, Arkansas 72201

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY BASS
ERIC SCHNAPPER
LYNN WALKER
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

APPENDIX

This Appendix sets forth cases in which the Clerk of the Supreme Court has awarded costs against a state, or a state official, during October Terms, 1970-76. With regard to awards against state officials, the list is limited to actions for injunctive relief against the defendant in his official capacity, in which the action was defended by the state and where, as a consequence, there was no suggestion that the costs would be paid by the defendant personally. Costs have also been awarded in damage actions against state officials, e.g. Scheuer v. Rhodes, No. 72-914; these cases, however, are not included, since, although the costs are in fact usually paid by the state, the defendant officials were personally liable.

(a) Civil actions for injunctive relief against states or state agencies, originating in federal court, in which costs were awarded to plaintiffs:

Alamo Cattle Co. v. Arizona, No. 74-125;
Christian v. New York Department of Labor, No. 72-5704;
Papish v. Board of Curators of University of Mississippi, No. 72-794.

(b) Civil actions for injunctive relief against state officials, originating in federal court, in which costs were awarded to the plaintiff:

Connor v. Waller, No. 74-1509 (Defendant was the Governor of Mississippi);

Meek v. Pittinger, No. 73-1765 (Defendants were the Secretary of State and Treasurer of Pennsylvania);

Chapman v. Meier, No. 73-1406 (Defendant was the Secretary of State of North Dakota);

Hagans v. Levine, No. 72-6476 (Defendant was the Commissioner of the New York State Department of Social Services);

Communist Party of Arizona v. Whitcomb, No. 72-1040 (Defendant was the Secretary of State of Indiana and the members of the Indiana State Election Board);

Committee for Public Education v. Nyquist, No. 72-694 (Defendant was the New York Commissioner of Education);

Norwood v. Harrison, No. 72-77 (Defendants were the members of the Mississippi State Textbook Purchasing Board);

Healy v. James, No. 71452 (Defendant was the President of Central Connecticut State College);

Fuentes v. Shevin, No. 70-5039 (Defendant was the Attorney General of Florida);

Taylor v. McKeithen, No. 71-784 (Defendant was the Governor of Louisiana);

Townsend v. Swank, No. 70-5021 (Defendant was the Director of the Illinois Department of Public Aid);

Great Atlantic and Pacific Tea Co. v. Cottrell, No. 74-1148 (Defendant was the Health Officer of Mississippi);

Yovakim v. Miller, No. 73-6935 (Defendant was the Director of the Illinois Department of Children and Family Services);

Planned Parenthood of Central Missouri v. Danforth, Nos. 74-1151 and 74-1419 (Defendant was the Attorney General of Missouri);

Craig v. Boren, No. 75-628 (Defendants included the Governor of Oklahoma).

(c) Civil Actions for injunctive or monetary relief, against a state or state official, originating in state court, in which costs were awarded to the plaintiff:

Austin v. New Hampshire, No. 73-2060;

Mescalero Apache Tribe v. Jones, No. 71-738;

McClanahan v. Arizona State Tax Commission, No. 71-834;

Evco v. Jones, No. 71-857;

Matz v. Arnet, No. 71-1182;

Bonnelli Cattle Corp. v. Arizona, No. 72-397;

Local 76 v. Wisconsin Employment Relations Commission, No. 75-185;

Boston Stock Exchange v. State Tax Commission, No. 75-1019.

(d) Habeas corpus actions against state officials, originating in federal court in which costs were awarded to the petitioner:

Francisco v. Gathright, No. 73-5768;

Robinson v. Neil, No. 71-6272;

Peters v. Kiff, No. 71-5078;

Loper v. Beto, No. 70-5388;

Humphrey v. Kady, No. 70-5004;

Morrissey v. Brewer, No. 71-5103.

(e) Criminal prosecutions arising in state court in which costs were awarded to the defendant:

Brown v. Illinois, No. 73-6650;

Faretta v. California, No. 5772;

Herring v. New York, No. 73-6587;

Bigelow v. Virginia, No. 73-1309;

Drepe v. Missouri, No. 73-6038;

Antoine v. Washington, No. 73-717;
Taylor v. Louisiana, No. 75-5744;
Jenkins v. Georgia, No. 73-557;
Spence v. Washington, No. 72-1690;
Codispoti v. Pennsylvania, No. 73-5615;
Davis v. Alaska, No. 72-5794;
Alexander v. Virginia, No. 71-1315;
Roaden v. Kentucky, No. 71-1134;
Chambers v. Mississippi, No. 71-5908;
Furman v. Georgia, No. 69-5003;
Jackson v. Georgia, No. 69-5030;
Branch v. Texas, No. 69-5031;
Turner v. Arkansas, No. 71-1309;
Brooks v. Tennessee, No. 71-5313;
Jackson v. Indiana, No. 70-5009;
Columbo v. New York, No. 71-352;
Smith v. Florida, No. 70-5055;
Rabe v. Washington, No. 71-247;
Alexander v. Louisiana, No. 70-5026;
Stanley v. Illinois, No. 70-5014;
Camp v. Arkansas, No. 70-353;
Santebello v. New York, No. 70-98;
McKinney v. Alabama, No. 74-532;
Doyle v. Ohio, Nos. 75-5014 and 75-5015;
Gardner v. Florida, No. 74-6593;
Roberts v. Louisiana, No. 76-5206;
Brown v. Ohio, No. 75-6933;
Hankerson v. North Carolina, No. 75-6568;
Coker v. Georgia, No. 75-5444.